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New York (State) Reports. Supreme Court.

HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LX.

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CASES REPORTED.

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PRACTICE REPORTS.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. WILLIAM FONTAINE BRUFF, THE BROOKLYN ELEVATED RAILWAY COMPANY and others.

Action against directors, &c., of a corporation for misconduct—By whom action to be brought—When attorney-general must bring action—Power of the court to appoint a receiver—Practice—Code of Civil Procedure, sections 1781, 1782, 1808, 1810.

The attorney-general, in behalf of the people of the state, may maintain an action "against one or more trustees, directors, managers or other officers of a corporation to procure a judgment * * * compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge," and "compelling them to pay the corporation which they represent, or its creditors, any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost or wasted, by a violation of their duties," and "suspending a defendant from exercising his office when it appears that he has abused his trust" (*Code of Civil Procedure, sections 1781, 1782*).

By section 1808 of the Code of Civil Procedure the attorney-general "must bring an action" for the purposes just enumerated, "if, in his opinion, the public interests require that an action should be brought;" and by section 1810, in an action brought for the objects specified, by the attorney-general, the court has power to appoint a receiver of the property of the corporation.

When the president of a railroad company makes a contract with himself for the construction of a railway; when he obtains all the securities, stock and bonds under the pretense of paying the nominal contractor; when as chief engineer he makes to himself as contractor certificates of work done, and then as president pays himself many hundred thousand dollars in advance of what the nominal contractor was entitled to receive under the contract for construction, ample cause is shown for the appointment of a receiver, and the command of the statute to the attorney-general that he "*must bring an action,*" becomes imperative.

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Although it is true that, under section 1782 of the Code of Civil Procedure, a creditor of the corporation, or a trustee, director, manager or other officer of the corporation could bring an action, not to suspend or remove a director, but to recover for the corporation the assets and property which its officers had wasted, it is:

Held, that an action which had been so brought by K., one of the directors and one of the defendants herein, in which P., one of the defendants herein was made receiver, is no bar to the action brought by the state through its attorney-general as required by section 1808 of the Code.

Ulster Special Term, November, 1880.

MOTION by plaintiffs for a receiver.

S. W. Knevals, Ashbel Green, George W. Wingate and E. Lauterbach, for motion.

Thomas M. North, H. H. Morse and A. Schoonmaker, opposed.

WESTBROOK, J.—The application for a receiver and an injunction in this action was made, and the questions involved therein fully argued three days since, but the pressure of other official duties prevented an immediate examination, and the continuance of such pressure precludes as full a discussion of its merits as would otherwise be attempted.

The Brooklyn Elevated Railway Company was originally incorporated by a special act of the legislature of this state, passed on the 26th day of May, 1874 (*chapter 585 of Laws of 1874*), which original act of incorporation was amended in 1875 (*chapter 422, Laws of 1875*), and in 1879 (*chapter 350 of Laws of 1879*).

By its charter the said railway company was "authorized and empowered to construct, maintain and operate an elevated railway between the proposed terminus on the Brooklyn side of the East River Suspension Bridge and Wood Haven, in the town of Jamaica, county of Queens and state of New York," the route between such points being designated, subject to

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an alteration thereof by the common council of the city of Brooklyn.

The complaint charges official misconduct and waste of the property of the company by the officers thereof, W. Fontaine Bruff, W. Hawkins Bruff, Henry V. Bruff, Richard G. Phelps and Edwin S. Keeler, and asks: 1st. That such officers, they being defendants in the action, should be compelled to account for their official conduct in the management of the corporation and its property. 2d. That they should also be suspended from their offices. 3d. That the corporation and the said officers should be enjoined from receiving any debt or demand due to the railway company, and from paying out or transferring any money or property belonging to it. 4th. That a receiver or receivers of the property of the defendant, the Brooklyn Elevated Railway Company, be appointed by the court with the usual powers of receivers in like cases; and 5th. That the plaintiffs shall have such further or other relief in the premises, as to the court shall seem just, together with the costs of this action.

The present motion is for an injunction and receiver, and is brought to a hearing upon an order to show cause, granted on the 30th day of October, 1880. In the disposition thereof the following points will be considered: 1st. The power of the court to grant the relief asked. 2d. The facts proved; and 3d. The objections made to the present application.

By sections 1781 and 1782 of "the Code of Civil Procedure" the attorney-general, in behalf of the people of the state, may maintain an action "against one or more trustees, directors, managers or other officers of a corporation to procure a judgment * * * compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge," and "compelling them to pay to the corporation which they represent, or its creditors, any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost or wasted, by a violation of their

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duties," and "suspending a defendant from exercising his office when it appears that he has abused his trust," and for various other purposes as are in said section 1781 specified.

By section 1808 of the Code it is declared that the attorney-general "*must* bring an action" for the purposes just enumerated, and, also, for other purposes mentioned in such section, "if, in his opinion, the public interests require that an action should be brought;" and by section 1810, in an action brought, for the objects specified, by the attorney-general, the court has power to appoint a receiver of the property of the corporation.

These provisions make it clear that the application is regular, provided the facts shown justify it. What is established?

The Messrs. Bruff and Keeler are now directors of the company. W. Fontaine Bruff was the president and chief engineer of the company, and the defendant Richard G. Phelps was a director until a very recent day.

On September 1, 1879, the railway company executed a mortgage to The Farmers' Loan and Trust Company of the city of New York to secure bonds of \$1,000 each, to the amount of \$3,500,000, but by the terms of the mortgage and the bonds issued thereunder the issue of such bonds was to be limited and confined to 350 bonds for each mile of said railroad.

The contract for the construction of the railway bears date the 7th day of February, 1879, and purports to have been made with Robert B. Floyd-Jones. By its terms the contractor was to be paid for each completed mile of road by the issue and delivery to him of 350 bonds of \$1,000 each, and \$500,000 of the capital stock of said company, but the issue was not to be in advance of the completion of the road unless the bonds were sold; in which case the proceeds were to be paid out no faster to the contractor than as the work was completed.

Prior to the actual execution of the contract with R. B. Floyd-Jones for the construction of the road, and on the 24th

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day of December, 1878, the said contractor had in writing assigned said contract to the defendant W. Fontaine Bruff, then and afterwards the president and chief engineer of the railroad company, as the same was "set forth in letters and documents dated from 11th to 24th December (1878) instant;" and after the actual execution of such contract of construction, and on the very day of the date thereof (February 8, 1879), the said Floyd-Jones made another and formal assignment thereof to the said Bruff. Both assignments were to Bruff, as trustee, but who the parties interested were, if other than Bruff, does not appear.

The interests of the corporation in the execution of the contract were entrusted to W. Fontaine Bruff, W. Hawkins Bruff, Harry V. Bruff, Richard G. Phelps and Edwin S. Keeler; and they also obtained all the stock and bonds of the company.

Not a single mile of railroad has yet been built, but \$1,203,000 of the mortgage bonds have been issued, also \$225,000 of scrip bonds, and capital stock to the amount of \$5,000,000; and obligations to issue and deliver stock to the amount of \$1,500,000 more have also been delivered. In other words, after an expenditure of stock and bonds to the amount of \$7,928,000, not a mile of road is completed, and the 26th day of May, 1881, by which date the structure must be finished under penalty of forfeiture of charter, is rapidly approaching.

The contracts for the construction of the road purport to be signed by W. Fontaine Bruff, as president of the railway company, in its behalf, and by R. B. Floyd-Jones in his own. The certificates, under which hundreds of thousands of dollars have been paid to the assignee of the contract, W. Fontaine Bruff, are signed by himself thus: "W. Fontaine Bruff, C. E., Engineer-in-Chief."

Many other facts are shown, but they will not be herein recited, as those which have been stated are sufficient to warrant action. When the president of a railroad company

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makes a contract with himself for the construction of a railway; when he obtains all the securities, stock and bonds under the pretense of paying the nominal contractor; when as chief engineer he makes to himself as contractor certificates of work done, and then as president pays himself many hundred thousand dollars in advance of what the nominal contractor was entitled to receive under the contract for construction, ample cause is shown for the appointment of a receiver, and the command of the statute to the attorney-general that he "must bring an action," becomes imperative.

Now, what answer is made to the application? None of the facts herein detailed are denied. On the contrary, they are all admitted, but it is claimed that Mr. Edwin S. Keeler, one of the defendants herein, had already brought a suit against the Messrs. Bruff and The Brooklyn Elevated Railway Company, making allegations similar to those made in this action, in which Mr. Richard G. Phelps, one of the defendants herein, was made receiver, and afterwards, on the petition of said Phelps, as receiver, Mr. Wagstaff was made a coreceiver with him, and, therefore, the present motion should be denied.

Before dealing with the legal questions which have been presented in connection with this objection, it is well to see who and what Messrs. Keeler and Phelps are.

Edwin S. Keeler, though a director of said company, was an employe of his codefendant Richard G. Phelps, holding one share of stock therein transferred to him by W. Fontaine Bruff. He was made a director on the second Tuesday in June, 1880, but Mr. W. Fontaine Bruff held his written agreement to resign as director whenever Bruff requested him so to do.

Richard G. Phelps was a director of the corporation during its gross mismanagement by Bruff, and was either cognizant, or ought to have been, of the whole thereof. As receiver he will be called upon to investigate his conduct as director, and however much he may be disposed to act fairly, he occu-

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pies the singular and impossible position of representing interests as receiver, which are in direct antagonism to his own as an individual (*McArdle* agt. *Barney*, 50 *Howard Pr.*, 97; see pages 103, 104). Phelps had also signed a written agreement to resign as director whenever Bruff demanded it, thereby evidencing his subserviency to the very party towards whom he professes to occupy a position of antagonism.

Various parties had threatened legal proceedings when Mr. Keeler instituted his action with, as the facts fully satisfy me, the full consent, approbation and co-operation of Bruff. In that suit, as has been previously stated, Mr. Phelps, and afterwards Mr. Wagstaff was added, was made receiver. Of course, in making that appointment, the court was uninformed of Mr. Phelps and Mr. Keeler's connection with the very frauds which they alleged, and in utter ignorance thereof its order was made. Ought that order to be a bar to this application?

It is true that, under section 1782 of the Code, Mr. Keeler, as a director of the corporation, could bring an action, not to suspend or remove a director, but to recover for the corporation the assets and property which its officers had wasted; but the attorney-general can also bring an action for that purpose, and for the additional one of suspending and removing directors. The action begun by Keeler can only afford partial relief at best; and though it was brought in good faith and for the purposes it professes, which I do not believe, I should be loath to hold that it was a bar to the one brought by the state, which alone can grant complete relief. Is a remedial statute, passed for grave and salutary reasons, to be nullified by any such narrow construction as that on which this objection rests? Is it possible that the officers who have defrauded a corporation can, when they fear action by the attorney-general, cause a suit to be instituted by one of their confederates, place all the property and assets of the corporation, by a formal order of the court, but made by a suppression of truth, into the hands of another confederate, and thus controlling all

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as much as ever, successfully defend an honest suit by the highest law officer of the state to protect honest creditors and shareholders? If this can be done, then justice is mockery and laws are mere waste paper. Besides, section 1808 of the Code requires the attorney-general, as we have already said, to bring this action. Upon that duty no restraint or limitation whatever is put, and that cannot be a sound construction of another section of the same statute giving permission to another person to bring an action for some of the same purposes, which makes one brought thereunder a bar to that which a high state official is imperatively commanded to institute.

Rule 87 of this court is also cited in opposition to this motion. That rule was adopted prior to the present Code. The latter, as has been already shown, gives the court full power to appoint a receiver in this action; and no rule of the court, prior or subsequent, can modify the statute.

Perhaps, if Rule 87 were literally construed, as the principal place of business of the corporation is at No. 48 Wall street, New York city, the appointment of receivers in the Keeler action, which was in Kings county, was bad. There is no occasion, however, so to hold. The rule does not abrogate the statute, and any construction thereof which would permit a collusive receivership and a collusive suit to bar a *bona fide* application by the attorney-general will not be adopted, even though its language, literally construed, favored the objection more strongly than it does, and though the Code had not since been enacted. Very clearly neither the spirit nor intent of the rule favors the defendants. It was adopted to promote justice and not injustice, and it requires a substantial and honest previous appointment to be a bar to a new application, and no fraudulent cover under the forms of law can prevent the recovery of a corporation's property from the possession of dishonest officers thereof.

No order is asked to remove receivers appointed in another action. What is demanded is an appointment in this action, and that relief must be granted. Which, whether those

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appointed in this or in the other action, shall hold and take the property is a question for another proceeding. A collusive suit, and a collusive prior appointment, cannot bar action looking to justice. The honest creditors must be protected, and such person or persons as they may nominate will be appointed for the trust.

No reflection whatever is intended to be made upon Mr. Wagstaff. No complicity in past actions with the officers of the defendant corporation is shown, but he was appointed at their instance and by their request, with the intent, probably, on their part, to give a color of fairness to their proceeding. If he is continued he can only be with the consent of those who hold the honest obligations of the corporation, and by severing his connection with those with whom he is associated.

N. Y. SUPERIOR COURT.

AN ASSOCIATION FOR THE RELIEF OF RESPECTABLE AGED
INDIGENT FEMALES, &C., agt. ALEXANDER EAGLESON and
others.

*Interest—Effect of change of statute upon a contract which has matured
before such change.*

Upon a contract for the payment of a sum certain on which interest at seven per cent was lawfully payable prior to January 1, 1880, by the terms of the contract, the rate agreed upon continues as part of the unimpaired obligation of the contract until judgment, notwithstanding the change in the statute and though the contract matured before such change.

Special Term, November, 1880.

MOTION for the confirmation of the report of the referee computing amount due and for judgment of foreclosure.

Association for the Relief of Aged Indigent Females agt. Eagleson.

William Vennill, attorney, and *M. A. Kursheed*, of counsel for motion.

J. W. Hawes, as guardian *ad litem*, for infant defendant Edward Eagleson.

FREEDMAN, *J.*—The question as to the proper rate of interest to be allowed in this case upon the principal sum due upon the bond and mortgage, is a very important and novel one. As such it has received careful attention.

By chapter 538 of the Laws of 1879, it was provided that the rate of interest for the forbearance of any money, goods or things in action should be six per cent. That act, by its terms, took effect on the 1st of January, 1880, but it expressly provides that nothing contained therein shall be so construed as in any way to affect any contract or obligation made before the passage of the act.

The bond and mortgage in question were made in 1870 to secure the payment of the sum of \$8,000 at the expiration of three years from the date thereof, together with interest thereon at the rate of seven per cent per annum, the then existing legal rate, to be computed from the date thereof and payable semi-annually thereafter.

As the act of 1879 was to have only a prospective operation, and especially under the saving clause contained therein, the rate of seven per cent was continued in force at least up to January 1, 1880. Whether it can be continued in this case until the entry of judgment depends upon the question whether the payment of interest after default made constitutes part of the unimpaired obligation of the contract, or of the remedy provided by law for its enforcement. The precise question does not seem to have been determined in this state. In *Lee agt. Davis* (1 *A. K. Marshall* [*Ky.*], 397) it was held that the rate of interest to be allowed on a promissory note relates to the right and not to the remedy, and is governed by the law as it stood at the date of the note.

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In *Bates* agt. *Wernwag* (4 *Blackf.* [*Ind.*], 272) the plaintiff, notwithstanding the change by statute, was held entitled to interest up to the time of the recovery at the rate mentioned in the note.

Myrick agt. *Battle* (5 *Florida*, 345) was an action upon a note dated March 14, 1844, payable one day after date. At the date of the note the statute provided that where no rate of interest was expressed in the contract, no higher rate than eight per cent should be charged. On the day after the execution of the note the statute was altered by reducing the rate to six per cent. The court held: Upon both principle and authority the respondent is entitled, as of right, to recover eight per cent. All contracts for the payment of money bear interest after maturity, though silent on the subject, unless there is an express stipulation to the contrary. * * * When the contract is silent as to the interest, as in this case, the law will imply an understanding on the part of the debtor to pay the legal rate; and this implied understanding is not only supported by mercantile usage in all commercial instruments of a negotiable nature, but because interest is considered as a legal incident to every debt, certain in amount and payable at a certain time. * * * The interest, though an incident to the debt, is impliedly a part of the contract, and the contracting parties are to be presumed to have had reference to the law as it existed at the time the contract was made, and, as a consequence, no statute altering the rate of interest can be made to affect contracts entered into before its passage, otherwise the obligation of the contract would be impaired, for the Constitution in this respect recognizes no distinction between express and implied contracts.

But in the quite recent case of *Wilson* agt. *Cobb* (31 *N. J. Eq.* [4 *Stewart*], 91), which arose under a statute similar to our own, but containing no saving clause, the chancellor of the state of New Jersey came to and enforced the conclusion that where interest is given, not by the terms of the contract but by law, by way of damages for the detention of a debt, it will

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be allowed according to the legal rate for the time being; and if there have been changes it will vary from time to time during the period for which interest is allowed according to the changes. At the same time the learned chancellor conceded in his opinion that a contract for the payment of money on which interest at the rate of seven per cent per annum was lawfully payable by its terms would still bear interest at that rate until the money be paid, or until judgment or decree, notwithstanding the change in the lawful rate to six per cent, and even though the contract matured before the change took effect. A judgment or decree entered upon it since that change would, however, bear interest only at the legal rate of six per cent.

To the report of the case last referred to the reporter appended a valuable collection of cases which, though highly interesting, it is not necessary to consider here.

From the examination already made it sufficiently appears that, whatever the true rule may be in cases in which the contract is wholly silent as to interest, in the case of a contract for the payment of a sum certain, on which interest at the rate of seven per cent was lawfully payable prior to January 1, 1880, by the terms of the contract, the rate agreed upon continues as part of the unimpairable obligation of the contract until judgment, notwithstanding the change in the statute, and though the contract matured before such change. For similar reasons it was held in *Andrews agt. Keeler* (19 *Hun*, 87) that where a promissory note upon its face provides for less than the legal rate of interest, the interest, even after default in the payment thereof, continues at the rate prescribed by the contract until merger into judgment.

The referee was, therefore, right in computing interest at the rate of seven per cent to the date of his report. The report must be confirmed, and the plaintiff may have the usual judgment thereon.

Ritch agt. Smith *et al.*

SUPREME COURT.

WELLS R. RITCH agt. JOHN B. SMITH *et al.*

Principal and agent—Extension of mortgage debt by agent—when unauthorized—Surety.

An agent authorized to receive payment of interest accruing on a mortgage and to collect the principal, and who received a portion of the principal before it was due, is not authorized to extend the payment of the mortgage debt after it became due.

To uphold the granting of such extension the agent should have been specially authorized thereto, or it should appear that the act was embraced within the powers allowed to be performed, or was ratified.

While a principal is presumed to have notice of the acts performed by his agent in the usual course of his agency, such presumption does not extend to acts clearly not within the agency.

The payment of a part of a mortgage debt after due, in itself affords no adequate consideration for an agreement made by an agent to extend the payment of the residue of the principal, or to discharge a surety.

Special Term, November, 1877.

THIS is an action for the foreclosure of a mortgage made by the defendant Schlesinger, given as collateral security for the payment of a bond executed by Schlesinger and the defendant Smith. Smith was surety upon the bond for the mortgagor. It was asked in the action that Smith should be bound for any deficiency which might arise on the mortgage sale.

Smith defended upon the ground that an extension of time had been granted to the mortgagor without his knowledge or assent, and that he was thereby discharged.

The court at special term held that the person who gave the extension was not the plaintiff's agent for such purpose, and that Smith was not discharged. The general term of the first department reversed the judgment at special term, holding that the agent had authority to give the extension. The court of

Ritch agt. Smith *et al.*

appeals, at its last session (November, 1880), reversed the judgment of the general term and affirmed that of the special term. The facts appear in the opinion of the special term.

Arnoux Ritch and *Woodford*, for plaintiff.

Blumenstiel & Ascher, for defendants.

VAN VORST, J. — Thomas G. Ritch was the agent of his father, the plaintiff, and, as he states in his affidavit verifying the complaint, "had charge of the plaintiff's interest in the matter of the bond and mortgage" sought to be foreclosed in this action.

The precise nature and extent of the agency is not indicated by any writing made by the plaintiff, or by any express direction or appointment in any form.

The extent of the agency and the power of the agent must be gathered from the acts performed by him, which were ratified and adopted by the principal.

He received the interest as it became due, and also a portion of the principal before it was payable by the terms of the mortgage. Ordinarily an agent authorized to receive payment of a mortgage or other obligation is deemed entitled to receive it when and after it becomes due, and not before (*Story on Agency*, sec. 98, and cases cited; *Smith agt. Kidd*, 68 N. Y., 130).

But the approval by the father of the acts of his son in receiving the money before it was due gives to the agency a more enlarged scope, and measurably interprets the language of the son when he states that he "had charge of the plaintiff's interests in the matter of the bond and mortgage."

When the agent received from the mortgagor, in September, 1873, a payment of eleven hundred dollars towards the principal of the mortgage, the same not being then due, he executed in his own name and delivered to the mortgagor a paper, by the terms of which he stipulated that on the payment of \$900 more by the mortgagor, on or before April 1,

Ritch agt. Smith *et al.*

1874, the time to pay the balance of the bond and mortgage should be extended to November 1, 1875.

The effect of this extension, if valid, is to release the defendant Smith, who signed the bond as surety, from all liability thereon, he not having assented to the arrangement; in fact being entirely ignorant of it.

There is no evidence of any original authority in the agent to extend the payment of the mortgage, nor is there any proof that the plaintiff ratified the act of his son in giving the stipulation to extend the payment of the balance beyond the time when it was due and payable by the terms of the mortgage. It does not appear that the principal was advised of the extension.

An agent, although authorized to receive payment of interest accruing on a mortgage, and to accept payment on account of principal before due, is not thereby authorized to extend the payment of the residue of the principal. To justify the granting of such extension the agent should have been specially authorized thereto, or it should appear that the act was embraced within other powers conferred or allowed to be performed (*Hutchings* agt. *Munger*, 41 *N. Y.*, 155; *Heyman* agt. *Berringer*, 1 *Abb. New Cases*, 315; *Josephthal* agt. *Heyman*, 2 *Abb. New Cases*, 22). It has been already stated that there is no evidence of the adoption by the father of his son's act in giving the stipulation. The fact is, however, that no positive step was taken by the father to enforce the payment of the sum remaining unpaid until December, 1876, from which, it is urged by defendant's counsel, that such omission to proceed to collect the mortgage for so long a time after it became due, is evidence of approval of what the son had done. Such forbearance does not necessarily lead to that conclusion. It is not irreconcilable with a satisfaction on the part of the plaintiff with the goodness of the security, and with an indisposition to disturb it so long as the interest was paid. Forbearance to collect does not establish knowledge of the extension claimed to have been granted by the agent.

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I do not think the power to extend payment is embraced within what may be implied by the words "having charge of plaintiff's interest in the bond and mortgage." That obviously means to guard, not jeopard the interests. It cannot be well urged that the power conferred should be to diminish the security or release a party obliged.

Besides, the payment of the additional sum of \$900 as a condition to the extension, does not furnish a good consideration for the stipulation to extend. For at the time fixed for such payment, as a condition to the stipulation, the mortgage moneys would be due by the terms of the mortgage, and in paying these, the mortgagee would only be doing what was required by the mortgage itself (*Lowman agt. Yates*, 37 *N. Y.*, 601; *Halliday agt. Hart*, 30 *N. Y.*, 474; *Olendorf agt. Union Bank*, 31 *Md.*, 126).

For the reasons above stated the defense interposed by the defendant Smith, that he has been discharged from his obligation by the act of the plaintiff or his authorized agent, is not established.

I fail to discover any hardship in this conclusion. As the surety was ignorant of the stipulation, so too it does not appear that he ever complained of the plaintiff's delay in not enforcing the mortgage sooner, and never asked for its enforcement.

And although this defendant occupies the relation of surety to the obligation and the creditor, which relation is favored and guarded in law and equity, still, in order that the act of an agent giving an extension of time to the principal debtor should have the effect to discharge the surety, it should clearly appear that the agent had authority, express or implied, to give the extension, or that his act was adopted by the creditor.

Some unfavorable comment is made by the defendant's counsel upon the failure of the plaintiff's counsel to produce the plaintiff as a witness on the trial, it being urged that the plaintiff was called upon by his own evidence to repel the presumption that he was notified of the stipulation given by his agent.

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A principal is presumed to have notice of the acts performed by his agent in the usual course of his agency. It would be going too far, I think, to hold that this presumption extends to everything the agent may do, and to acts clearly not within the agency.

That the plaintiff had notice of this extension and adopted it was for the defendant to show. He called and examined the attorney himself as a witness, but failed through him to establish notice or knowledge.

The plaintiff it appears is a non-resident of this state. I cannot say that he was absolutely called upon to be present at the trial, at inconvenience and expense, to disprove a fact which the defendant failed to establish.

There must be judgment for the plaintiff.

ALBANY OYER AND TERMINER.

THE PEOPLE agt. HIRAM G. BRIGGS.

Practice in criminal cases — Indictment — On a motion to quash, for irregularity — When a grand juror may be examined — When defendant may move before plea to quash — When facts in the moving affidavit may be alleged on information and belief — Effect of — When indictment will be quashed — Wife not a competent witness against her husband — Right of a defendant in an indictment to a list of the witnesses and copy of the testimony before the grand jury.

Where the defendant in an indictment moves to quash the indictment for irregularity, a grand juror may be examined and testify to facts showing the irregularity, if it do not arise out of misconduct by the grand jury.

If an indictment be improperly and irregularly found the defendant may, before plea, move upon affidavit to quash it for such irregularity. The moving affidavit may allege the facts constituting the alleged irregularity upon information and belief, if they should be within the knowledge of the district attorney; and if so alleged they may be sufficient to call upon him to dispute them if not correctly set forth in the moving affidavit.

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If an indictment be found or based wholly, or in part, upon evidence clearly incompetent and illegal it will be quashed and the defendant remanded, that his case may be passed upon by another grand jury upon competent and proper evidence.

Quære. Whether, if it be shown that an incompetent witness was sworn and gave testimony before the grand jury, the law does not presume that testimony to defendant's injury was given by such witness and cast the onus of showing the contrary upon the public prosecutor?

Under section 2 of chapter 782 of the Laws of 1876 a wife is not a competent witness *against* her husband, and cannot be called against him by the people without his consent.

Right of defendant in an indictment to a list of the witnesses and copy of the testimony before the grand jury discussed by counsel but not determined by the court as the indictment was quashed.

October, 1880.

HON. A. M. OSBORN, justice supreme court, presiding.

HONS. JAMES R. MAIN and JOHN GUTMANN, justices sessions.

DEFENDANT moved, upon an affidavit by himself and Nathaniel C. Moak, his counsel, to quash an indictment against him for murder in the first degree, in killing one Erskine Wood, found by the grand jury at this term.

The affidavit alleged among other things, upon information and belief, that on the hearing of the charge against defendant, on which the indictment was found by such grand jury, there was evidence tending to show that defendant shot and killed said Wood while committing adultery, or having carnal connection with defendant's wife, and that on such hearing defendant's wife was called, sworn and testified before the grand jury without his knowledge or consent, and, among other things, testified, in substance, that she never committed adultery or had carnal connection with Wood, and was not so engaged at the time defendant shot Wood. The application was also based upon the testimony before WILLIAM K. CLUTE, police justice of the city of Albany, where defendant's wife was allowed to be called and sworn against him, though objected to by his counsel as incompetent.

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The affidavit stated that the affiants were informed and believed the testimony of the several witnesses before the grand jury was substantially the same as before the police justice.

The district attorney read no opposing affidavit, but, after the reading of the moving affidavit, objected that as it was upon information and belief it was not sufficient to call upon the people to answer it.

The court ruled that as the fact whether defendant's wife was sworn and gave testimony before the grand jury, and what she testified to was presumptively within the knowledge of the district attorney, it was sufficient to call upon him to answer the moving affidavits.

Defendant's counsel insisted that as an incompetent and illegal witness testified before the grand jury the presumption, until met or explained by the people, was that the testimony of the witness was prejudicial to defendant, particularly as it is charged on information and belief what the substance of the testimony was, and that is not denied. We, however, have the foreman of the grand jury subpoenaed here to show what the fact was.

The court replied, perhaps that is so, and if you choose to rest your case upon that, of course we shall pass upon the question. If, however, you choose you may call the foreman and show positively what the fact was; you may do so, and the court, upon so important a question, would prefer a certainty to a presumption or a statement upon information and belief. Defendant's counsel thereupon called Peter J. Vedder, the foreman of the grand jury, and offered to swear him as a witness. The district attorney objected that he was not a competent witness, and, also, that he should not be allowed to testify as to what occurred in the grand jury room. The court overruled the objections and the witness being sworn testified, that on the hearing before the grand jury of the charge against defendant there was evidence before the grand jury tending to show that defendant shot and killed Wood while having connection with defendant's wife, and that

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defendant's wife was sworn before the grand jury and, among other things, testified she never had had carnal connection with Wood, that she was asleep when the first shot was fired and was awakened by it.

Other facts appear in the opinion.

Nathaniel C. Moak and *Martin D. Conway*, for defendant.

First. The irregularity or wrong not appearing on the face of the indictment the proper remedy is to move to quash the indictment (1 *Bish. Crim. Proc.* [3d ed.], sec. 763; *People* agt. *Shattuck*, 6 *Abb. N. C.*, 33; *U. S.* agt. *Coolidge*, 2 *Gall.*, 364; *Reg.* agt. *Heane*, 9 *Cox Cr. Cas.*, 433; *People* agt. *Hulbut*, 4 *Denio*, 136).

In *People* agt. *Hulbut* (4 *Denio*, 136) the court, per BRONSON, chief justice, said: "The indictment when presented in due form by the grand jury and filed in court is a record, and like other records imports absolute verity. It cannot be impeached unless it be upon motion by showing that it was not founded upon sufficient evidence, or that there was any other fault or irregularity in the proceedings."

In the same case (p. 136) the court further said: "In *Low's case* (4 *Greenl.*, 439) the grand jurors were allowed to testify that they acted under the mistaken impression that it was sufficient, if a majority of the jurors concurred, in finding the bill, and that twelve of their number had not in fact agreed to the bill in question. But this was not on a trial before the traverse jury, but on a motion, and the court fully recognized the distinction between attacking a record in a collateral proceeding and a motion to set aside or amend it. So long as the record remains no defect in the evidence upon which it was founded, nor any irregularity in the proceedings, however great, can furnish any answer to it. But when the ends of justice require it a record may be set aside on motion; and when set aside that is an end of it" (*See, also, People* agt. *Restenblatt*, 1 *Abb. Pr.*, 268; 3 *Am. Law Reg.* [*O. S.*], 418; *People* agt. *Strong*, 1 *Abb. Pr.* [*N. S.*], 247-249).

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Second. The grand jury is a constituent part of the court of oyer and terminer, and the control of that court over its proceedings continues, and may be thus exercised after the grand jury has adjourned (*People agt. Naughton*, 7 *Abb. [N. S.]*, 421, 423, 424 ; 30 *How. Pr.*, 430 ; *State agt. Cowan*, 1 *Head [Tenn.]*, 280 ; *Clem agt. State*, 33 *Ind.*, 418). The minutes of evidence taken before the grand jury are a part of the records of the court and remain in the custody of one of its officers (*State agt. Little*, 42 *Iowa*, 51). A court always takes judicial notice of its own records in the cause (1 *Whart. on Ev.*, sec. 325) ; and this though not brought before it by affidavit (*Crann agt. Smith*, *L. R.* [4 *Exch.*], 146). On a motion to admit the accused to bail the court will always inspect the minutes of the testimony before the grand jury (*People agt. Shattuck*, 6 *Abb. N. C.*, 37 ; *People agt. Van Horne*, 8 *Barb.*, 158 ; *People agt. Hyler*, 2 *Park. Cr. Rep.*, 570, 572). The application of the accused for inspection of the minutes made in the grand jury rooms must be founded on irregularity on the part of the grand jury, which the defendant is entitled to take advantage of, and on the necessity of the production of the minutes for that purpose to enable him to prepare for trial (*People agt. Naughton*, 7 *Abb. Pr. [N. S.]*, 421 ; 30 *How. Pr.*, 430). The moving affidavit states all the facts required by the court, in *People agt. Naughton* (7 *Abb. Pr. [N. S.]*, 431, 432), to entitle defendant to a copy of the minutes of the testimony. The oyer and terminer may, upon cause shown, order a list of the witnesses examined before the grand jury, on finding an indictment, to be furnished by the district attorney to the accused, and allow the accused to examine the minutes made by the grand jury in case of irregularity in their proceedings affecting his indictment (*People agt. Naughton*, 7 *Abb. Pr. [N. S.]*, 421 ; 30 *How. Pr.*, 430). "A party indicted for a capital offense is entitled, as a matter of right, to a list of the witnesses examined as to his case before the grand jury" (*Com. agt. Locke*, 14 *Pick.*, 485 ; *Com. agt. Knapp*, 9 *Pick.*, 495, 497).

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In *Com. agt. Knapp* (9 *Pick.*, 497), WILDE, J., said : " A list of the witnesses has never been refused in a case of this kind " (*See, also, People agt. Naughton*, 7 *Abb. Pr. [N. S.]*, 428).

Third. When the proceeding is to attack the record directly by motion to set it aside, instead of collaterally, the evidence of grand jurors is competent to show the irregularity (*People agt. Shattuck*, 6 *Abb. N. C.*, 35; *People agt. Hulbut*, 4 *Denio*, 136). " It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room; but it is now held that such disclosure, wherever it is material to explain what was in issue before the grand jury, or what was the testimony of particular witnesses, will be required " (*Wharton's Crim. Ev.* [8th ed.], sec. 510). " The oath of the grand juror does not prohibit his testifying to what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private rights " (*Burnam agt. Hatfield*, 5 *Blackford [Ind.]*, 21). " The oath of the grand juror is no legal or moral impediment to his solemn examination, under the direction of a court as to evidence before him, whenever it becomes material to the administration of justice " (*State agt. Broughton*, 7 *Iredell [N. C.]*, 96, 100).

In *People agt. Shattuck* (6 *Abb. N. C.*, 34-36) the court, on motion to set aside the indictment because not found by twelve grand jurors, said : " The motion was opposed upon the grounds that parol testimony could not be given to impeach the action of the grand jury; that the indictment was a record and imported absolute verity, and that no member of the grand jury could be sworn to disclose their deliberations. These objections apply to a case where it is sought to impeach the record in some collateral proceeding; but this is a direct motion before the court, in which the record remains, to have it set aside as void or erroneous. The accused is protected by the bill of rights and cannot be held to answer for a capital, or otherwise infamous crime, unless on presentment

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or indictment of a grand jury. That grand jury must be a legal grand jury, and the vote of twelve at least of the body must concur in the finding of a bill, otherwise one cannot be found.

“When it is suggested to the court that an irregularity or error in the respect now urged had occurred, it is consistent with the general superintending power and duty of the court that a proper inquiry should be instituted in order that the evil or wrong may be arrested (*Commonwealth agt. Smith*, 9 *Mass.*, 110; *Low's Case*, 4 *Greenl.*, 439; *People agt. Strong*, 1 *Abb. Pr. [N. S.]*, 244).

“Now, of what service would this inquiry be to the accused or to public justice unless grand jurors could be called upon and testify as to the vote, the concurrence, which is of so essential and vital importance?

“The inference, from the fact that the grand jury have found and presented an indictment, is that it was so found by the concurrence of at least twelve of the number of that body. It is no state secret, nor is it a part of their counsel, which each member has been sworn not to divulge. If it was, then they could never disclose the fact that an indictment had been found. How each one voted, or what each one said during their deliberations, are matters that can never be disclosed, for upon the inviolable secrecy which the law has imposed as to these particulars depends, in a great degree, the efficiency and independence and integrity of the grand inquest. It is of necessity that some grand juror must be called upon to testify as to whether a vote was taken and the result, else the investigation as to those facts would be futile.”

In *Commonwealth agt. Mead* (12 *Gray*, 170, 171) the court, after considering the rule that whatever affects the action of grand jurors so far as their vote and personal conduct is concerned cannot be disclosed, proceeds: “But when these purposes (the finding of an indictment and arrest of the accused) are accomplished the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione*,

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cessat regula. After the indictment is found and presented and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardships and injustice might often be occasioned by depriving a party of important evidence essential to his defense by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist."

"The case at bar furnishes a good illustration of the truth of this remark. No possible injury to the interests or rights of the government, that we can see, could happen by a disclosure of the testimony given by the witness before the grand jury which was excluded by the ruling of the court. Certainly none has been suggested by the learned attorney for the commonwealth. On the other hand it is clear that the rights of the accused might be greatly affected and his peril much increased if he can be shut out from showing the fact that an important witness against him is unworthy of credit, or that his testimony before the jury of trials is to be taken with great caution and doubt, because on a previous occasion, when called to testify on oath, he had given a different account of the same transaction from which he has stated in his evidence at the trial. In the absence of a binding authority on this point we think the exclusion of such evidence is not sanctioned by any rule of law or sound principle of public policy."

"There is no principle of law or rule of policy which, in such a case, ought to exclude them. It is entirely different from where they are called upon to impeach a verdict on the ground of their own misbehavior or that of their fellows" (*Follansbee agt. Walker*, 74 *Penn. St. R.*, 309).

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“On no sound principle can it be said that a witness who has testified before a grand jury shall be permitted to claim that his evidence was a privileged communication so that it shall not be shown, under the direction of the court, whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights” (*Gordon agt. Commonwealth*, 4 *Vir. L. J.*, 464 [*Supreme Court, Penn.*]).

In this case the court (pp. 467-469) said: “If the witness be incompetent for the purpose offered it must be by reason of public policy. The question, to its full extent, does not appear to have been ruled by this court. As the rule was held at an early day he would be incompetent. For a long time, however, the courts have gradually been modifying its strictness and manifesting a determination to distinguish between the character of the evidence offered. The juror may be a competent witness for some purposes and not for others. Thus, in *Sykes agt. Dunbar* (2 *Wheat. Selw. N. P.*, 1091), one of the grand jury, by whom a true bill had been found, was held competent to testify as to who was the prosecutor, although it was contended he could know the fact only from the testimony which had been produced before him in his character as a grand juror, and which it was claimed he was bound not to disclose. This case was cited with approbation in *Huydekoper agt. Cotton* (3 *Watts*, 56), and the competency of a grand juror to testify as to who was the prosecutor affirmed. In this case the part of the grand juror’s oath, ‘the commonwealth’s counsel, your fellows and your own you shall keep secret,’ was considered and a reasonable construction given to it. Substantially, it was said, the oath and whole proceeding before a grand jury was not intended to protect the innocent witness and juror, but to punish the guilty party. It should not be so construed as to punish the innocent or obstruct the due course of justice. On no sound principle can it be said that a witness who has testified before a grand jury shall be permitted to claim that his evidence was a priv-

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ileged communication, so that it shall not be shown, under the direction of the court, whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights. It must be conceded that the rule shall not be carried so far as to conflict with the juror's oath. He shall not testify how he or any member of the jury voted, nor what opinion any of them expressed in relation thereto, nor to the act of either, which might invalidate the finding of the jury. His action and the action of his fellow-jurors must be shown only by the returns they make to the court. What a witness has testified to before them is quite another matter. A witness may be indicted for perjury for false swearing before a grand jury, and grand jurors are competent witnesses to prove what he swore to before them (1 *Whar. Am. Crim. Law*, sec. 508)."

"It is said in 1 *Wharton's Law of Evidence* (sec. 601): 'It was at one time supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room; but it is now held that such evidence, whenever it is as material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required.' This conclusion appears to be sustained by numerous authorities, among which may be cited *Thomas agt. Commonwealth* (2 *Robinson* [Va.], 795); *State agt. Offnutt* (4 *Blackf.*, 355); *State agt. Fassett* (16 *Conn.*, 457); *Commonwealth agt. Hill* (11 *Cush.*, 137); *State agt. Broughton* (7 *Iredell*, 96); *Commonwealth agt. Mead* (12 *Gray*, 167); *Way agt. Butterwith* (106 *Mass.*, 75).

"The case of *Commonwealth agt. Mead* (*supra*) rules the precise case we have before us. It was an indictment for manslaughter. To contradict a witness, who testified in behalf of the commonwealth on the trial, the defendant offered to prove by the grand jurors who found the indictment that he testified differently before them. The court below excluded the witness on the ground that it was against public policy and established practice to permit grand jurors to detail the

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evidence given before them for the purpose of impeaching the witness on the trial of the indictment. On exceptions taken the case was reversed, the court holding that when the case was reached for trial all useful purpose of secrecy had been accomplished. The necessity and expediency of retaining the seal of secrecy were at an end and the jurors were held competent for the purpose of proving the facts."

"A prosecuting attorney, it has been held, is privileged from disclosing the proceedings of the grand jury, though not from an examination as to the testimony of witnesses, or as to other matters to which a grand juror could testify" (*Whart. Crim. Ev.* [8th ed.], sec. 512; *Knott agt. Sargent*, 125 *Mass.*, 97; *State agt. Van Buskirk*, 59 *Ind.*, 384). What a witness testifies to before a grand jury is not privileged, but where it becomes material in a legal investigation affecting the rights of parties it may be proved by the district attorney or a grand juror.

In *State agt. Van Buskirk* (59 *Ind.*, 384) the court said (*p.* 389): "A part of the oath of the grand jury is that they will not disclose any evidence given or proceedings had before the grand jury. * * * Notwithstanding this oath, it has been held by this court, and it may be regarded as settled, that this oath of secrecy 'does not prevent the public, or an individual, from proving by one of the jurors, in a court of justice, what passed before the grand jury' (*Burnham agt. Hatfield*, 5 *Blackf.*, 21; *Shattuck agt. The State*, 11 *Ind.*, 473, and *Burdick agt. Hunt*, 43 *Ind.*, 381).

"In the case last cited it was said of this oath that thereby 'the grand jurors are required to keep secret the evidence given, and proceedings had, before them, unless legally called upon in a court of justice to make disclosures.'

"The prosecuting attorney is not bound by any such oath of secrecy; and certainly we know of no sufficient reason why he may not be called upon, in a court of justice, to disclose any evidence given, or proceedings had, before the grand jury, of which he may have personal cognizance. It is said

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that it is contrary to public policy to allow the defendant in a criminal case to call upon the prosecuting attorney, as a witness in a court of justice, to disclose any evidence given, or proceedings had, before the grand jury. We fail to see the matter in that light. In our opinion, public policy does not require that any citizen should be convicted of a public offense by means of doubtful evidence. Where, as in this case, the principal witness for the state has made, as it was claimed, statements under oath before the grand jury in regard to the transaction upon which the criminal charge is predicated, which statements cannot be reconciled with the evidence of the witness on the trial, and this is personally known to the prosecuting attorney, it seems to us that neither his official duty nor public policy would require that he should withhold his evidence of the fact when called upon by the defendant to testify as to the fact, and seek a conviction of the defendant upon evidence, which, from the facts within his personal knowledge, he had reason to believe was at least doubtful.

Fourth. "*Ubi jus ibi, remedium.*" There is no wrong without a remedy is one of the best known, as well as one of the most useful, maxims of the law (*Broom's Leg. Max.* [7th Am. ed.], 191). By the proposed Code of Criminal Procedure (*proposed* 1880, *secs.* 255, 256, *page* 69 ; *secs.* 249-260, *same Code reported* 1850) it is provided :

"§ 255. In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other evidence than,

1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence ; or

2. The deposition of a witness in the cases mentioned in the third subdivision of section 8.

§ 256. The grand jury can receive none but legal evidence."

These sections are but enunciations of the common law. A grand jury is bound to take the best proof of which the case admits ; and it is the duty of the prosecuting officer to take care that no evidence is received by them which would

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not be admissible at trial (2 *Hawk. Pl. Cr.* [*Curw. ed.*], 353, book 2, chap. 25, secs. 138, 139; 4 *Hawk. Pl. Cr.* [*Leach's ed.*], pp. 80, 81; *Denby's case*, 1 *Leach* [4th ed.], 514). A grand jury should have the original affidavit for the finding of bills of indictment when the affidavit is required to be proved, i. e., on the charge of perjury (*Keenan agt. Boylan*, 1 *Schoales & Lefroy*, 232).

In *State agt. Cain* (1 *Hawkins' N. C.*, 352), where an indictment was found upon the knowledge of a grand juror, without his being sworn as a witness, it was quashed and set aside. In *Hawkins' Pleas Crown* (4 *Hawk.*, 82 [*Leach's ed.*], book 2, chap. 145, note; 2 *Id.* [*Curw. ed.*], 354, note) the rule is thus laid down :

"A grand jury, however, ought not to find an indictment upon the evidence of incompetent witnesses; and therefore where an indictment against one Crossly was presented, and the only names on the back of it were Priddle and Holloway; and the grand jury, on its being proved to them that these two persons had been convicted of conspiracy, applied to the court at the Old Bailey in October sessions, 1788, the court told them that they ought not to find the bill on such testimony alone, for having been convicted of an infamous crime, their competency was destroyed. MS."

In England it has been held that when the accused pleaded to the indictment and went to trial it was a waiver of any defect in the method of finding the indictment, though where the witnesses had not been sworn before the grand jury the court unanimously recommended a pardon (*Rex agt. Dickinson, Russell & Ryan*, 401). Though on motion, before plea, to quash the indictment because the witnesses before the grand jury were not properly sworn, the indictment was quashed (*Matter of Middlesex Commission*, 6 *Car. & P.*, 90; 25 *Eng. C. L.*, 336).

In *United States agt. Coolidge* (2 *Gall*, 364) a motion was made to quash an indictment on the ground that the grand jury received testimony of a person not under oath, and for

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that reason the indictment was quashed as irregularly found. In that case the counsel for the defendant presented the affidavit of Lee, the witness, that he was not sworn, while the district attorney read the affidavits of the marshal and his deputy that they thought Lee was sworn in the open court with the other witnesses for the government. Judge STORY (*p.* 367) said: "Lee's affidavit is direct and positive as to a fact of which he could not be ignorant. The counter affidavits are merely of impressions. The court must be governed by the rules of evidence, and the facts must, therefore, be taken to be as stated by Lee. Of the law arising upon these facts there can be no doubt. The grand jury is the great inquest between the government and the citizen. It is of the highest importance that this institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court, and this indictment, having been found irregularly and upon the mere statement of a witness without oath, which was not evidence, a *cassetur* must be entered."

This case and *Low's case* (4 *Maine*, 439) was approved in *State agt. Burlingham* (15 *Maine*, 104, 107, 108), though the court held in that case the defendant had waived the objection by plea, whereas in *State agt. Low* he had properly taken the objection before plea. "Where a defendant is required by a jury to testify touching a criminal charge against him, and in pursuance of such requisition does testify before them touching such charge, the indictment for such offense returned by the grand jury will be set aside" (*State agt. Froiseth*, 16 *Minn.*, 296). The grand jury are under the control of the court, and it is the province and duty of the court to see that the finding is proper in point of law; and if not, the court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury (*State agt. Cowan*, 1 *Head [Tenn.]*, 280-282). So an indictment should be

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quashed when it clearly appears by affidavit that it was found by the grand jury without adequate evidence to support it (*People* agt. *Restenblatt*, 1 *Abb. Pr.*, 268; 3 *Am. L. Reg. [O. S.]*, 418; *People* agt. *Strong*, 1 *Abb. Pr. [N. S.]*, 248, 249; *People* agt. *Hyler*, 2 *Park*, 570). The distinction is this: If there be some legal evidence to sustain the indictment, not mingled with illegal evidence, the court will not quash the indictment because it might not, on such evidence, have indicted the accused. In analogy to the finding of a jury in a civil case the court will not disturb it on the weight of the evidence. But where legal evidence is so blended and mingled with illegal evidence that the court cannot, with absolute certainty, determine whether or not the jury would have found the same indictment without the illegal evidence which was before them, in analogy to reviewing the finding of a jury upon any question of fact, the court is bound to set aside the finding in order that the party injured by the illegal evidence may have the facts properly passed upon by the appropriate tribunal, the grand jury. If the illegal evidence bears in the least degree upon the result it cannot be disregarded (*Worrall* agt. *Parmelee*, 1 *N. Y.*, 519; *Anderson* agt. *Rome*, &c., 54 *N. Y.*, 334; *Baird* agt. *Gillett*, 47 *N. Y.*, 186). So if there be no evidence to authorize the finding of the indictment, as matter of law it is unjustified, and will be quashed.

Fifth. Defendant's wife was not a competent witness against him

By the common law, and under the statute law of this state, down to the year 1876, neither husband nor wife could be examined as witness for or against each other, except in prosecutions for personal violence inflicted by one upon the other.

By chapter 448 of the Laws of 1876, section 831 (passed June 2, 1876), it was provided that :

“A husband or a wife is not competent to testify against the other, upon the trial of an action, or the hearing, upon the merits of a special proceeding founded upon an allega-

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tion of adultery, except to prove the marriage. A wife is not a competent witness for or against her husband in an action for criminal conversation. A husband or wife shall not be compelled to disclose a confidential communication made by one to the other during the marriage."

This relates to civil actions.

At the same session (*by chapter 782, Laws of 1876*) the legislature had enacted (April 27) that:

"§ 2. In all criminal trials, and examinations before trial, a husband or wife may be examined as a witness on behalf of the other, but upon no such trial or examination shall a husband or wife be compelled to testify against the other."

Before this section the wife was not a competent witness against, or for, her husband.

The court of appeals had held that: "A wife is not competent witness against her husband in a civil action or proceeding" (*Wilkie agt. People*, 53 *N. Y.*, 525).

It required an affirmative provision, making her competent on either side, to make her so. This section affirmatively declares she shall be for her husband, and then proceeds negatively to say that she shall not be compelled to testify against him. There is no affirmative declaration that she may. A mere negative provision that she shall not be compelled to be, certainly is not an affirmative provision that she may be. When the act of 1876 was passed, no one would have claimed that, under any circumstances, she was competent against her husband. If not competent she could not be allowed to be sworn against him. Suppose the legislature had simply passed an act in the words of the last part of the section, "upon no such trial or examination (criminal trials and examinations before trial) shall a husband or wife be compelled to testify against the other." Would it have been anything more than a declaration of part of the law, as it then existed, that a husband or wife should not be compelled to testify against the other? It would have removed no existing incompetency. It would have given or conferred no competency.

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It is a novel proposition that the competency of a witness, as a witness against another party, depends upon the willingness of the witness to testify, without the slightest power on the part of either party, of the court, or of the law, to interfere or to have a word to say on the subject (*See 22 Alb. L. J.*, 81).

The Iowa Code provides as follows:

"§ 3641. The husband nor wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding one against the other, but they may in all civil and criminal cases, be witnesses for each other."

Under this statute in *State agt. Houston* (50 *Iowa*, 512), after conviction defendant sought to reverse the conviction on the ground that his wife was called as a witness before the grand jury.

The court said: "Amelia M. Houston, wife of the defendant, was examined and testified before the grand jury. It is insisted by the defendant that that fact rendered the indictment void, and that the verdict cannot be allowed to stand. The wife cannot be a witness against her husband except in a criminal prosecution for a crime committed against her, and in a civil action brought by one against the other, but she may be a witness for him in all cases (*Code, sec. 3641*). When the grand jury have reason to believe that evidence within its reach will explain away the charge, it may order such evidence to be provided (*Code, sec. 4276*).

"A witness, then, called before the grand jury is not necessarily called against the defendant. It might be the defendant's privilege that his wife should be called.

"If, however, where a defendant's wife is called, and the facts of which she has knowledge are unfavorable to the husband, it would be proper for her to object to testifying, and we think she could not be compelled to testify against her objection. If she testified, and her testimony was unfavorable to her husband, so that it appeared that the indictment was found, in

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whole, or in part, upon her testimony, possibly the indictment might be quashed upon that ground. But the defendant should judge whether her testimony was favorable or unfavorable before proceeding to trial, and moved to quash if he thought there was ground for it. We think it too late to raise an objection of this kind after conviction."

The Texas Code provides that :

"The husband and wife can in no case testify against each other, except in a criminal prosecution for an offence committed by one against the other; but they may, in a criminal prosecution, be witnesses for each other" (1 *Tex. App. Rep.*, 284).

In *Dill agt. State* (1 *Tex. App. R.*, 278), the wife of one defendant was allowed to be called by the state under objection by the co-defendants of the husband. A *nolle prosequi* was subsequently entered in favor of her husband.

On error, after giving at length (*pp.* 282, 283), the reasons upon which the wife was not allowed to be called against the husband, and quoting the above section of the Code, the court (*pp.* 284, 285), says :

"It is further contended on the part of the state that when the *nolle prosequi* was entered as to the defendant, William Bell, he became a competent witness, and that if Mrs. Bell had then been placed on the stand there could have been no objection to her testimony; for that, as to the remaining defendants then on trial, she sustained no disqualifying relation, and stood disinterested, but that if there were any good objections to the testimony of Mrs. Bell at the time it was delivered, they were removed when a *nolle prosequi* was entered as to her husband. After mature reflection, and a careful examination of the authorities, we do not believe that she was a competent witness for the state against the appellants at the time she testified. The construction we put upon article 3113 is, that it was never intended so to change the rules of the common law as to make her a competent witness to testify against other defendants on trial with her husband,

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as in this case ; for the article of the Code relied on says, the husband and wife can in no case testify against each other except in a criminal prosecution for an offence committed by one against the other. If her testimony was not competent at the time it was given, the entering of the *nolle prosequi* as to her husband did not remove the objections to it. After the *nolle prosequi* was entered she might have been called to the stand as a witness for the state, and her testimony would have been admissible. But this was not done."

In *Hubbell agt. Grant* (39 *Mich.*, 641), it was held that :

"The statutory rule that a husband may not testify against his wife without her consent, cannot be waived, in her absence, by the mere omission of her attorney to object to the testimony."

The court (*pp.* 643, 644), said : "Section 5969 of the compiled laws provides that the husband shall not be examined as a witness, for or against his wife without her consent. No consent was given in this case, and unless we can say that because no objection was made by Mrs. Grant to the examination of her husband she thereby waived the benefit of this provision, his testimony as against her cannot be considered and complainant must, therefore, fail. It does not appear that Mrs. Grant was present during the examination, or any part thereof, so that the failure to object, and a waiver thereby, must have been that of her attorney or solicitor in the case. The reason of the rule for excluding either husband or wife from being witness in a case in which the other was a party was so strong that, according to Professor Greenleaf, it could not be relaxed even by consent ; that the public had also an interest in the preservation of domestic peace, which might be disturbed by the testimony notwithstanding the consent (1 *Greenleaf Ev.*, sec. 340).

"If, then, the rule was so strict at common law, and our statute has so far relaxed it, that by consent they may be examined, can it mean that an actual assent is not necessary, but that consent may be implied from the mere silence of the

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other party or that of her solicitor in her absence? We are of opinion that this would be carrying the relaxation of the rule to an extent not contemplated by the legislature. There may be cases where both parties are present and one is called as a witness, where a failure to object might be deemed a waiver, but in the absence of such party we are of opinion that her solicitor's silence could not supply the place of her actual consent."

In *State agt. Donovan* (41 Iowa, 587), under a statute somewhat similar to ours, the husband called his wife as a witness in his own behalf, and the court below refused to allow her to testify. The supreme court reversed the judgment, holding the husband had a right to call her in his own behalf; not a word was uttered about her being competent against her husband.

The motion should be granted.

Lansing Hotelling, district attorney, and *William F. Beutler*, assistant district attorney, for People.

OSBORN, P. J. — The defendant was indicted by the grand jury of Albany county, at this present term, for the murder of one Erskine Wood, at the town of Coeymans, in July last. The defendant, upon being arraigned, was given, at the request of his counsel, an opportunity before pleading to move to quash the indictment, and his request was granted.

This motion is, therefore, to quash the indictment; also, that the accused may be furnished with the names of the witnesses who appeared before the grand jury, and on which the indictment was obtained, as well as the evidence, or a true copy thereof, as given by such witnesses.

The motion to quash the indictment is based solely on the ground that the wife of the prisoner was called as a witness, and gave important testimony against him, and this without his knowledge or consent.

The district attorney, upon the motion, stated that no

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minutes of any consequence were kept of the testimony before the grand jury; that there had been a thorough examination of the charge before the coroner and the police magistrate of this city shortly after the homicide, and that full minutes were kept on such investigations. The witnesses before the grand jury were examined by the district attorney or his assistant, from these minutes, and it is asserted that the evidence is substantially the same.

I have examined these minutes, though very voluminous, with great care, to determine whether the evidence given by Mrs. Briggs probably affected or influenced, in any degree, the grand jury in presenting an indictment against the prisoner for murder in the first degree.

The prisoner has resided for many years in Coeymans. For some time before the day on which the homicide occurred, he had been upon the jail limits of Albany, an execution or executions having previously been issued against his body. He was in the habit of leaving the city every Saturday night after midnight, and going to his home in Coeymans, where he resided with his wife, returning before midnight Sunday evening, so as to prevent any action for an escape. The deceased, Erskine Wood, was, and for some months had been, a hired man, and boarded in the family of Briggs.

Briggs is a man well advanced in years. Mrs. Briggs is a second wife, and a comparatively young woman. Wood was a young man.

On Sunday morning, July eleventh, Briggs arrived at his home at 2 or 3 o'clock in the morning, and got into the house without disturbing any of the inmates. He remained in an outer room, not going to the bed-room of his wife, and where she was at the time.

A short time after, Wood, as prisoner alleges, came from his own room in a nude state and went to Mrs. Briggs' room and into the bed with her, and was about to commit adultery, when Briggs fired a pistol or revolver, inflicting injuries or wounds from which Wood died.

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After being shot, Wood ran to the house of a neighbor and was taken in and cared for. Briggs at once rings a bell attached to some of the buildings, and by this and the noise made by him he succeeded in getting some of his neighbors aroused, and they get to Briggs' house at about, or shortly after, daybreak.

To these he makes the statement of the circumstances under which he shot Wood.

The neighbor to whom Wood went swears that he was naked when he first came to his house, and this greatly tends to corroborate the prisoner's version of the transaction.

That Wood died from pistol wounds discharged by prisoner is not denied.

The more serious and difficult question to determine is, under what circumstances did the killing take place?

I also find some evidence tending to show intimacy between Mrs. Briggs and Wood during the prisoner's absence from home, such as riding together on several occasions.

It appears that, before the grand jury, Mrs. Briggs denied any adulterous or improper intercourse or intimacy with Wood, and says he was not in her room, to her knowledge, that night, and that she was first aroused by the discharge of the revolver and noises immediately following.

It will, therefore, be seen that her testimony was most unfavorable and damaging to her husband, and would leave the impression that the killing was a deliberately planned act on the part of Briggs, and from a premeditated design to kill Wood.

In a word, that it was not committed in the heat of passion upon sudden provocation, or under such circumstances as to make the crime anything less than murder in the first degree.

I am aware that the court of appeals has held, and all will admit properly, that a man may be guilty of murder in the first degree for killing another, while in the very act of adultery with his wife, when such killing was the work of deliberation and premeditation.

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But the same court has held that such adulterous conduct may furnish the greatest provocation for killing the adulterer, and when this is done upon a sudden discovery, in a moment of great mental excitement, and when the passions are aroused, so that the man has no time for deliberation and premeditation, but acts from the impulse of the moment, without an intent to kill, the crime is not murder, and a conviction could not be expected for any higher offense than manslaughter in the third degree.

From this it will be seen how important was the testimony of Mrs. Briggs for the prosecution, and how damaging to the accused. Without this, *non constat*, the indictment might not have charged this grave offense.

It may be said that this can do no harm, even though it be erroneous, as upon the trial the alleged improper evidence can be kept out. But under this indictment no bail can be given. The prisoner must remain in custody without such an opportunity for preparing his defense as his freedom would allow him, and which he might secure by bail if the indictment was for a lesser offense than is here charged.

This brings me to consider the question which underlies this motion. Was it proper, competent and legal for Mrs. Briggs to give this evidence? Does the law permit her to be called as a witness and give evidence against her husband and in favor of the prosecution, even though she may be willing, without the knowledge or assent of her husband? If so, the important part of this motion must be denied.

By the common law, and under our statutes prior to 1876, neither husband or wife could be examined as a witness for or against each other, except in prosecutions for personal violence, one upon the other. Unless, therefore, we can find some statute since that time which in express terms makes it competent for the prosecution to call Mrs. Briggs as a witness against her husband, on a criminal charge, her evidence was not only improperly received by the grand jury, but it is absolutely incompetent.

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The only statute under which it is pretended that such a course as was here pursued is permitted or admissible, is to be found in section 2, chapter 782 of the Laws of 1876, passed April twenty-seventh. That section reads as follows :

Section 2. In all criminal trials, and examinations before trial, a husband or wife may be examined on behalf of the other, but upon no such trial shall a husband or wife be compelled to testify against the other.

Does this section confer the right claimed by the prosecution? It seems to me clearly not. The only innovation which this section makes upon the common law or the statutes as they formerly existed, was to give a right to a husband or wife to be examined as a witness on behalf of the other in a criminal trial or examination. Suppose this were all of the section, would it be contended for a moment that either could be called as against the other? Of course not.

Now, the other words are of a negative character. They certainly create no new right or privilege as to the husband or wife being witnesses that did not exist before. Mark the language: "But upon no such trial or examination shall a husband or wife be compelled to testify against each other."

The only construction that can be given to these words to warrant the position taken by the prosecution, would be that, because the legislature said they could not be compelled to testify against the other, the inference is they might do so if such testimony was voluntarily given. But it would be most dangerous to allow any such interpretation or construction of the section. Such an innovation upon the common law would require a positive, affirmative provision or enactment of the legislature. She could not be called as a witness in behalf of her husband until the legislature so enacted.

She certainly cannot be called to give evidence against him until the authority is expressly given.

It may be that the latter part of the section amounts to nothing. Certainly no one claimed, before its enactment, that husband or wife, by any law that ever existed, could be

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compelled to testify against each other (*Wylie* agt. *People*, 53 *N. Y.*, 525).

But it may have been placed there (and I think this the more probable reason for the employment of the language) to prevent a husband or wife, after being called as a witness for the other, or on behalf of the other, as the language is, from being compelled, on cross-examination, to testify to facts injurious to the party in whose behalf he or she was called, and not inquired of on the direct examination, or at all necessary to explain the evidence given in chief.

For instance, a wife might be called as a witness on behalf of the husband, to prove some one isolated fact. It may be that the legislature, by saying that she should not be compelled to testify or give evidence against him, intended to prevent, upon a cross-examination, an inquiry into any other matters not inquired of upon the direct examination, and which might be very damaging to the husband, and so *vice versa*. Whether this be the correct solution or not, it is quite immaterial. It is enough that no positive enactment can be found making it proper to call husband or wife as a witness against the other. The following authorities (if indeed authorities are necessary on this point) go to substantiate this reasoning (22 *Alb. L. J.*, 81; *State* agt. *Houston*, 50 *Iowa*, 512; *Dill* agt. *State*, 1 *Tex. App. R.*, 278; *Hubbell* agt. *Grant*, 39 *Mich.*, 641).

I have thus endeavored to show that Mrs. Briggs gave most important evidence against her husband before the grand jury, and, second, that such evidence was incompetent, for the reason that she could not legally give such evidence. It only remains to consider what is the remedy of the prisoner, if any.

The law requires, and the grand jury are always charged, that no indictment should be presented unless the guilt of the accused is clearly established by credible, legal and competent testimony. It may be said, and truthfully, that no indictment could ever stand if it was to be set aside because some illegal evidence was admitted. The grand jurors are not lawyers

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and it often happens that questions are put and evidence elicited that would not be allowed in court. Shall every indictment therefore be set aside? I answer, by no means. Where there is sufficient legal evidence to warrant the finding of a bill, no court would set it aside for technical illegalities, which it is apparent did not and could not have influenced the action taken. But in this case the mistake is one of substance, and examining, as I have, with great care the evidence taken, I am by no means prepared to say that such a conclusion would have been arrived at without the testimony of Mrs. Briggs.

In view of what has been stated it would seem that some remedy should be afforded to the accused. I think the relief invoked by his counsel, viz. : The motion to quash the indictment, the only one that can be afforded. In a case reported in 2 *Gallison*, 364, judge STORY, at page 367, says :

“The grand jury is the grand inquest between the government and the citizen. It is of the highest importance that this institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court; and this indictment having been found irregularly, and upon the statement of a witness without oath, which was not evidence, a *cassetur* must be entered” (*See, also, State agt. Burlingham*, 15 *Maine*, 101; *People agt. Shattuck*, 6 *Abb. N. C.*, 33; *People agt. Hulbut*, 4 *Denio*, 136; 1 *Bish. Crim. Prac.* [3d ed.], sec. 763; 1 *Abb. Pr. R.*, 268; 1 *Abb. Pr. [N. S.]*, 248, 249).

We think the indictment should be quashed, and the prisoner remanded to await the action of another grand jury.

In view of this disposition of the case it is quite unnecessary to examine the other branches of this motion.

The following order was thereupon approved and entered :

The grand jury at this term of the court having found and returned an indictment against the defendant for murder, and the defendant having moved, on the affidavits of Hiram G. Briggs and Nathaniel C. Moak, to quash said indictment.

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Now, after reading said affidavit and notice of motion, reading the minutes of testimony before the police justice, and taking the testimony of the evidence of Peter J. Vedder, the foreman of said grand jury, *viva voce*, by which it appeared Allie T. Briggs, the wife of said defendant, was sworn as a witness in behalf of the people against her said husband, before said grand jury, on the investigation of the charge against defendant, whereon the indictment was found, and that said Allie T. Briggs, among other things, testified on such hearing and investigation before said grand jury that, at the time when defendant is claimed to have killed said Erskine Wood, she said Allie T. Briggs, was not committing adultery or having carnal connection with said Erskine Wood, one of the questions before the grand jury being whether defendant so killed said Wood while having carnal connection with defendant's wife; and that said indictment was in part based and founded upon such incompetent evidence. After hearing Nathaniel C. Moak, of counsel for defendant, and Lansing Hotaling, district attorney of Albany county, opposed, it is ordered and adjudged that said indictment be and the same hereby is quashed and prisoner remanded to await the action of another grand jury.

NOTE.—The precise point involved in the case of Briggs, as to the competency of the wife as a voluntary witness against her husband, was decided the same way in *Byrd agt. State* (57 Miss., 243), reported since judge OSBORN's decision. The Code of Mississippi (*sec.* 759) provided (57 Miss., 245) that "Husband and wife may be witnesses for each other in all criminal cases, but they shall not be *required* to testify against each other as witnesses for the prosecution. Nothing herein contained shall be so construed as to debar full cross-examination by the prosecution of any husband or wife of an accused party who may be placed on the stand for the defense." The court below (*p.* 245) "held that, under this section, the wife may be a *voluntary* witness for the prosecution against her husband's consent."

The supreme court, on error, reversed the conviction, saying (*pp.* 245-7): "We are constrained to differ from him (the judge below) in the construction he has placed on this statute.

"The statute is in derogation of a very ancient and well established rule

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of the common law, based, as we have above seen, in great part, upon grave reasons of public policy, having reference to the preservation of the happiness of parties joined together in the marital relation. Statutes which are in derogation of the common law must be construed strictly, so as not to give them an operation and effect beyond the clearly expressed intention of the legislature (*Hopkins* agt. *Sandidge*, 31 *Mass.*, 668). Such statutes are to be construed with reference to the principles of the common law, and it is not to be presumed that the legislature intended to make any innovation on the common law further than the necessity of the case required (*Edwards* agt. *Gaulding*, 38 *Miss.*, 118; *Holman* agt. *Bennett*, 44 *Miss.*, 322). The rule of the common law excluded them as witnesses both for and against each other in criminal as well as civil cases. There was no difference as to their exclusion in either class of cases, and the rule was the same whether they were offered as witnesses for or against each other, except in a small class of criminal cases, where the wife was admitted to testify against the husband for her own protection and personal security. This being the state of the law, the legislature, by section 760, made them competent witnesses for each other in civil cases, leaving them still incompetent as witnesses against each other in that class of cases. In the section under consideration, the language is, 'husband and wife may be witnesses for each other in all criminal cases,' clearly showing that the legislature intended to apply the same rule as to their competency in criminal and in civil cases. If the legislature had intended to make them witnesses against as well as for each other, it would have been an easy matter to express that intent in unmistakable language. No reason is perceived why the legislature should not have done so, if, indeed, they had that intent, nor is it easy to give a satisfactory reason why the legislature should make them witnesses against each other in criminal cases, when it is undoubted that they are restricted in civil cases to being witnesses for each other. The whole force of the implication, that the legislature intended to allow one to be a *voluntary* witness against the other in criminal cases, arises from the use of the words 'but they shall not be required to testify against each other as witnesses for the prosecution,' following immediately after the provision allowing them to be witnesses for each other, and as a part of the same sentence. We regard this as rather an over-cautious insertion to prevent an apprehended construction of the preceding words, than as engrafting a new and independent provision on the statute, which would be the case if it allowed the examination of one against the other, in case the party offered as a witness did not object.

"But if we are to construe this language to mean that the legislature thought that by the common law husband and wife might be required to testify against each other, when they were allowed to testify in behalf of each other, and to infer that this provision was inserted to prevent the

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operation of such a rule, without the consent of the party offered as a witness, it does not follow that we are to construe the provision as making this erroneously supposed rule of the common law a part of the statutes of the State. An enactment of the legislature, based on an evident misconception of what the law is, will not have the effect, *per se*, of changing the law so as to make it accord with the misconception (*Davis* agt. *Delpit*, 25 *Miss.*, 445).

"For the error in admitting the wife to testify against the husband, against his objection, the judgment is reversed, and a new trial granted, and cause remanded" (*And see, also, People* agt. *Crandon*, 17 *Hun*, 490). [REP.]

U. S. CIRCUIT COURT.

WILLIAM R. CLARKSON *et al.* agt. ROBERT C. MANSON.

Removal of cause—How amount in dispute determined—Counter-claim must be considered.

Where an action is brought in a state court for an amount less than \$500, and the defendant in his answer pleads a counter-claim exceeding the sum of \$500, which is replied to by the plaintiffs:

Held, on an application for removal from state to a Federal court the counter-claim must be considered, and that the matter in dispute exceeds \$500 (*Overruling same case in 49 How.*, 480).

Southern District of New York, November, 1880.

MOTION to remand case to the marine court of the city of New York.

Ira D. Warren and *John Bassett, Jr.*, for motion.

D. M. Porter and *George H. Kracht*, opposed.

BLATCHFORD, *J.*—The plaintiffs brought this suit against the defendant in the marine court of the city of New York to recover the sum of \$195 as the balance unpaid on a sale of the fixtures of a store and bake-house. The answer put in, in the state court, sets up that the plaintiffs, with intent to defraud, falsely represented to the defendants that the bake-

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house was a profitable business place, and that one Ott, a former proprietor of it, had done a profitable business at it and thus induced the defendant to hire the store; that the plaintiffs also represented that they owned the store and the bakery fixtures in it and offered to sell them to him; that he, to secure for one day the right to purchase them, paid to plaintiffs five dollars as a deposit on the agreement that if he was not satisfied with the fixtures the five dollars should be forfeited; that the defendant, not being satisfied with the store and fixtures, immediately notified the plaintiffs thereof; that the place had never been a profitable business place for a bakery; that Ott closed it because he could not make it pay the expense of keeping it; that the fixtures were mortgaged and were owned by Ott and not by the plaintiffs; that the plaintiffs knew this; that the defendant, relying on said representations and believing them to be true, rented the store and furnished it with new fixtures and made repairs in it, and fitted it up at great expense and hired help to conduct the business of the bakery, and that he has not realized any moneys from the business carried on at the place and was unable to make the business pay expenses, but was obliged to close it to his damage, \$750, which he sets up as a counter-claim against the plaintiffs. The answer denies all the allegations of the complaint not thus admitted or denied, and demands judgment against the plaintiffs, that the complaint be dismissed, with costs, and that he have judgment against the plaintiffs for \$750. This answer was put in September 13, 1880. A reply, sworn to September 15, 1880, was put in by the plaintiff replying "to the allegations of counter-claim contained in the answer," and denying each and every of said allegations.

On the 20th of September, 1880, the defendant presented to the state court a petition, signed and sworn to by him September 18, 1880, setting forth the pendency of the suit as an action commenced and pending by the plaintiffs against the defendant; that the plaintiffs are, and were at the time of the commencement of the action, citizens of New York, and

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the defendant a citizen of New Jersey; "that the matter in dispute in this action exceeds, exclusive of costs, the sum or value of \$500;" that "the defendant has appeared in this action, in this court, and answered the complaint;" that the action had not yet been tried, and that no term had passed since it was commenced at which it could be tried. The petition prays that "the said suit may be removed" to this court. The proper bond was given and approved by the state court, and on the 20th of September, 1880, that court made an order *ex parte* which recites the contents of the petition and the tenor of the bond; "and on reading and filing a copy of the pleadings in said action," and the petition and the bond, orders that the petition and bond be accepted, and declares that said court will proceed no further in the suit, it being removed to this court. Afterwards, and before the commencement of the next term of this court, and before a copy of the record in the state court was filed in this court, that court made an order vacating the said order of removal. The ground assigned for making this second order, in the decision made by judge McADAM, the judge of the state court, was that the amount in dispute in the suit was only the amount stated in the complaint, and not the amount claimed in the counter-claim set up in the answer; and that as the matter in dispute did not exceed, exclusive of costs, the sum or value of \$500, the case was not one for a removal under section 2 of the act of March 3, 1875 (18 *U. S. Stat. at Large*, 470). Notwithstanding this second order, the defendant, claiming that the suit was removed to this court, filed in this court, on the first day of this term, a certified copy from the state court of the proceedings therein, to and including the order of removal, and entered an order *ex parte*, as an order of course not signed by a judge, reciting the filing of said copy record, and ordering that the cause proceed no further in the state court, and that it proceed in this court in the same manner as if it had been originally commenced therein, and that the appearance of the defendant be and was thereby entered.

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The plaintiff now moves for an order vacating the order so entered in this court, and remanding this action to the state court and striking from the files of this court the record so filed here. It appears when the order of removal was made the pleadings in this case were none of them exhibited to the judge of the state court, although the order of removal recited that they were read. They were presented on the making of the second order.

The second section of the act of 1875 provides that "any suit * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of '\$500,' in which there shall be a controversy between citizens of different states * * * either party may remove said suit." The defendant here contends that the matter in dispute, on the issue raised by the counter-claim in the answer, and the reply thereto, exceeds \$500, exclusive of costs; that there is a controversy in regard to such matter, made a controversy conclusively by the plaintiff, by his reply to the counter-claim; and that on this ground the defendant can remove the whole suit into this court.

Under the New York Code of Civil Procedure (*sec.* 500) an answer may contain a counter-claim, that is, a statement of new matter constituting a counter-claim. Such counter-claim (*sec.* 501) must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of certain specified causes of action. A plaintiff may (*secs.* 494, 495, 496), demur to a counter-claim, distinctly specifying the objections, one of which may be that the counter-claim is not of the character specified in section 501. Where a counter-claim is established which equals the plaintiff's demand, judgment goes for the defendant. Where it is less than the plaintiff's demand the plaintiff has judgment for the residue. Where it exceeds the plaintiff's demand the defendant has judgment for the excess, or so much thereof as is due from the plaintiff (*Sec.* 503). The plaintiff, if he does not demur, may reply to the counter-claim denying what he controverts (*Sec.* 514).

A counter-claim is held to be an affirmation of a cause of

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action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff. As a cross-action, setting forth a cause of action by the defendant against the plaintiffs, and demanding a judgment thereon for \$750 (in addition to the dismissal of the plaintiffs' complaint and the defeat of the plaintiffs' claim), the claim in which cross-action is disputed by the plaintiffs by the reply, the counter-claim clearly brings into the suit a matter in dispute which exceeds \$500 in value. Even if the defendant should have judgment only for the difference between \$195 and \$750; that would be more than \$500; but he claims \$750 and that the plaintiffs shall have no judgment. There may be two actions in one point of view. One may be regarded as an action by the plaintiffs against the defendant to recover the \$195. The plaintiffs may fail to recover any part of that, or they may recover a part of it, or they may recover the whole of it. The answer, and the counter-claim in it, may have the effect, if proved, to diminish or defeat the plaintiffs' recovery (*Sec.* 501). If the plaintiffs' recovery is wholly defeated, then the defendant becomes actor and may recover judgment for the whole or a part of the \$750. Still both proceedings are in one suit, as the word "suit" is used in the act of 1875. The first section of the act of 1875 uses the expressions "suits of a civil nature," "civil action" and "civil suit" as synonymous. The second section of that act uses the expressions "suits of a civil nature" and "said suit" in the same sense. The third section of that act uses the expressions "suit" and "such suit," and "the cause" and "action" in the same sense. The same is true of the same words, and also of the word "case," when used in the subsequent sections of that act. In the sense of sections 2 and 6 of the old Code of Procedure of New York (unrepealed), the proceeding by the defendant against the plaintiffs to recover the \$750 is an action and a civil action, the defendant being permitted to become actor in the given case. The statutes of New York now use the word "action"

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and discard all other terms. The proceeding by the defendant against the plaintiffs being a civil action, in a suit of a civil nature, and the matter in dispute in it exceeds, exclusive of costs, the sum or value of \$500, it is brought in the state court under the authority of the statute of New York, in the form in which it is brought, although the defendant is turned into a plaintiff and the plaintiff into a defendant, and jurisdiction of the person of the plaintiff is obtained by the fact that the plaintiff came into court and brought the defendant in first, in the action brought by the plaintiff, it clearly makes a case for removal. But what is to be removed? The act of 1875 says that "said suit" is to be removed. Is the proceeding or action by the defendant, his affirmative claim, the only thing that is to be removed, leaving the claim of the plaintiffs to be litigated in the state court, the former claim being \$750 and the latter \$195? In view of the facts that the suit is, in form, one brought by the plaintiffs against the defendant, and includes the plaintiffs' claim by the voluntary act of the plaintiffs, and is made to include the defendant's claim by the operation of the statute of New York, and that thus there is but one suit, though there are two controversies in it, and that the whole suit is to be removed and that either party may remove it, and that the counter-claim necessarily "must tend in some way to diminish or defeat the plaintiffs' recovery," it follows that the whole suit is removed, including all the issues, by the complaint, the answer and counter-claim, and the reply.

The case of *West agt. Aurora City* (6 *Wallace*, 139) is not in point. The facts there were not at all like the facts in this case, and it arose under a different statute.

In *McLean agt. St. Paul, &c., Railway Company* (16 *Blatchf. C. C. R.*, 309) a construction was given to section 2 of the act of 1875, to the effect that a suit, where the requisite citizenship for removal did not exist when the suit was brought, might become removable by the occurrence of the requisite citizenship during the pendency of the suit. Under

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that ruling it must be held that it is not necessary that the requisite amount in dispute should appear to have existed when the suit was brought. After proceedings for removal are completed a party cannot be deprived of his right by any action of the state court, or of the other party, in reducing the amount appearing to be in dispute (*Kanouse agt. Martin*, 15 *How.*, 198). But there is nothing to prevent a state court from allowing an insufficient amount in dispute to become an adequate amount under the act of 1875, or prevent such insufficient amount from becoming an adequate amount under that act by the operation of the statute of New York and the lawful acts of the parties to the suit thereunder.

The motion to remand the suit and for other relief is denied.

SUPREME COURT.

OLIVIA M. KERRISON, suing as OLIVIA M. JENS, agt. JOHN D. KERRISON.

Marriage—validity of—Prohibition in divorce decrees—Effect of marriage solemnized in another state when forbidden by a judgment of a court of this state—Under what circumstances such marriage will not be annulled.

In 1875, judgment of divorce was obtained in this court against the defendant by his wife Ellen for his adultery, and by the terms of the judgment the defendant was prohibited from marrying again until Ellen should be actually dead.

In 1875, Ellen being still living, the parties to this action, for the purpose of evading the prohibition contained in such decree, went to the state of New Jersey and were there married, intending to and in fact returning soon thereafter to this state, where the defendant was at the time a domiciled resident, and where the plaintiff also resided. At the time this action (which was brought to declare the marriage void) was begun, the defendant was, and now is, a British subject and a resident of Canada, the summons being served by publication. The defendant appears and answers, but in his answer denies the jurisdiction of the court in the premises:

Held, that, it is an open question whether legislation upon the subject since the adjudications holding such marriage to be void, has given such

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a legislative interpretation to the old statute, that a prohibition against a subsequent marriage was intended only as a punishment of the offending party.

Held, also, that if the marriage of the parties *was* illegal, the plaintiff is not in position to ask to be relieved from its bond. The facts as stated, being fully borne out by the proofs, render it extremely improper for the courts to afford the plaintiff any relief. The law does not interfere between those who are equally in the wrong.

The case of *Marshall* agt. *Marshall* (2 *Hun*, 238) criticised and not followed.

Special Term, September, 1880.

MOTION on behalf of the plaintiff to confirm the report of the referee and for judgment annulling the marriage of the parties.

Francis M. Scott, for plaintiff.

C. Stewart Davison, for defendant.

MACOMBER, *J.* — The defendant and one Ellen Flynn were married in the month of May, 1869, at Toronto, Canada. On the 21st day of May, 1875, judgment of divorce was obtained in this court against the defendant by his wife Ellen for his adultery, and by the terms of the judgment the defendant was prohibited from marrying again until Ellen should be actually dead. On the 14th day of October, 1875, Ellen being still living, the parties to this action, for the purpose of evading the prohibition contained in such decree, went to the state of New Jersey and were there married, intending to and in fact returning soon thereafter to the state of New York where the defendant was at the time a domiciled resident and where the plaintiff also resided. At the time this action was begun the defendant was, and now is, a British subject and a resident of Canada, where the summons herein was personally served upon him under an order for the publication thereof. The defendant appears and answers, but in his answer denies the jurisdiction of the court in the premises.

The referee says, in his opinion, that he feels constrained, though reluctantly, to follow the authority of *Marshall* agt.

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Marshall (2 *Hun*, 238), and so doing pronounces the marriage of the plaintiff and defendant void.

It is quite unfortunate that the expectation expressed in the vote of the learned presiding justice of the court which pronounced the decision was not realized, and the case reviewed by the court of appeals. But, it seems, that the action ended with the judgment there given. On this account, and in view of the persuasive dissenting opinion delivered by Mr. justice DANIELS, the decision has not, I think, commanded that cheerful acquiescence of the bench and bar, which is ordinarily accorded to the deliverances of that court. It has, however, upon the most important of social matters, namely, the devolution of property and the legitimacy of offspring, served to add uncertainty and insecurity to those laws whose greatest value consists in their certainty and repose. Were I permitted to do so, and were it necessary to decide this case upon the principle involved in the *Marshall case*, I should adopt the opinion of judge DANIELS as to the exposition of the law. Indeed, has not legislation upon the subject, since the decision of that case, rendered it entirely competent for the court, even at special term, to inquire into the reason for now holding to the rule which, it is claimed, was established in *Marshall* agt. *Marshall*?

By chapter 321 of the Laws of 1879, section 49 was amended so as in a proper case to enable the court to relieve a person of the penalties of a divorce for his or her adultery. That section as amended reads as follows:

“Whenever a marriage has been or shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant, but no defendant convicted of adultery shall marry again during the lifetime of the complainant, unless the court in which the judgment was rendered shall in that respect modify such judgment, which modification shall only be made upon satisfactory proof that the complainant has remarried, that five years have elapsed since the decree of divorce was rendered,

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and that the conduct of the defendant since the dissolution of said marriage has been uniformly good."

This is, it seems to me, a legislative enactment and a legislative interpretation of the old statute, that a prohibition against a subsequent marriage was intended to be only a punishment of the offending party.

It is true the subsequent section of the original act declares void marriage contracted in violation of the statute. But should it not be borne in mind, when marriages like this, contracted abroad, are sought to be declared void, when it is attempted to give to our statute and a decree of our court extra territorial effect, that after all the offense against our laws was not radical, but only of such a nature that a court could permit it to be done even on our own soil?

The offense, therefore, which persons commit who go hence to be married, is not *malum in se*, but *malum prohibitum*, against the effect of which they might have been relieved by a court; can it then be reasonably contended that an act of such a character, which was lawful in the state where it was committed, shall be so treated by the courts of this state as to upset the laws of inheritance and legitimacy? This is far different from the prohibition against polygamous and incestuous marriages, whether they be those under the so-called Levitical law or under a statute of the state. These things go to the root of social and state matters. The others, so far as affecting the peace and purity of the state, are non-essentials.

As it seems to me for our courts to hold a marriage concededly valid in a sister state, where solemnized, invalid in our own state, simply because our statute and a judgment of our courts have prohibited one of the parties to marry again within a limited period for misconduct in our state, is not, in the true spirit of inter-state comity, designed to be secured by section first of the fourth article of the Federal Constitution, nor is it in the direction of an enlightened comity of Christian nations. On the contrary, it savors a little of *intra-mural* arrogance.

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The two cases mainly relied upon as sustaining the prevailing opinion in *Marshall agt. Marshall* arose as follows: *Brooks agt. Brooks* (7 *Jurist* [U. S.], 422) upon a marriage regarded by the British laws as incestuous; and the other, *Commonwealth agt. Hunt* (4 *Cush.*, 49), upon a marriage pronounced polygamous by statute. By the statute (5 and 6 *William IV*, chap. 54 [1835, 1836]) marriages between persons within the prohibited decrees are declared to be absolutely null and void. What those decrees are is not stated by the statute, but this is determined by the previously established rules of the Canon law and older statutes. Relationship, both by consanguinity and by affinity, is comprehended within the prohibition in accordance with the so-called Levitical decrees. Hence it is that marriage, in England, with a deceased wife's sister is within those decrees and consequently void. In the way of such marriages the Catholic church has placed an *impedimentum dirimus*. That prohibition became a part of the Canon law, and later it was enacted into the civil law.

The case of *Brooks agt. Brooks* should be read in the light of this history, which fully explains the language of lord CAMPBELL, when he brought that case within the exception to the general rule which he fully recognized, that a marriage valid where contracted, was valid everywhere. So too of the case of *Commonwealth agt. Hunt*. Polygamy has never been recognized by any Christian state. Until the statute pronounced the marriage polygamous, the courts of Massachusetts, I think, with uniformity held such a marriage valid (*See opinion of judge DANIELS above referred to*).

The learned judge, writing the opinion of the majority of the court in *Marshall agt. Marshall*, refrains from considering how far the case would be affected had the element of a departure from the state with the intent to avoid the former judgment been wanting. But there is, it seems to me, no middle ground. On the hypothesis of the *Marshall case*, a due respect to logic or reason will carry us to the conclusion that a marriage contracted in another state in good faith can-

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not be recognized here if prohibited by our laws on any ground. Otherwise there would be imparted to the delicate and complicated contract of marriage validity or invalidity, accordingly as the intent of the parties was respectful or discourteous to our sovereignty. This would make such a relationship insecure and would thrust into the marriage contract an element necessary to its validity which no other contract requires, and would upset the well-founded rule that a contract otherwise valid is not rendered invalid by the intent with which it was performed (*Ponsford agt. Johnson*, 2 *Blatch.*, 51.) By reason of the act of 1879, quoted above, the question supposed to be closed in the supreme court is, I think, fairly open. But I do not purpose to enter upon a discussion of it further, nor to rest my decision on ground adverse to the *Marshall case*, for I see at hand another and sufficient reason for dismissing the plaintiff's complaint.

If the marriage of the parties was illegal, the plaintiff is not in position to ask to be relieved from its bond. The complaint alleges: "That this plaintiff and said defendant left this state as aforesaid, and proceeded to the state of New Jersey, as aforesaid, and procured said marriage ceremony to be performed in said state of New Jersey as aforesaid, *with the object and intention and for the purpose of avoiding and evading the prohibition contained in the aforesaid decree of this court hereinbefore set forth, and the effect and consequences of the statute pursuant to which said prohibition was included in said decree.*

That at the time said marriage ceremony was performed, as aforesaid, neither this plaintiff or the said defendant had any intention of residing or remaining in said state of New Jersey, but they both intended and expected to return to this state as soon as said marriage ceremony had been performed."

These allegations being fully borne out by the proofs render it extremely improper for the court to afford the plaintiff any relief. The law does not interfere between those who are equally in the wrong. *In pari delicto portior est conditio*

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defendentis (Peck agt. Burr, 10 N. Y., 294; Tracy agt. Talmadge, 14 N. Y., 162, 181, 216; Candee agt. Lord, 2 N. Y., 269, 276; Meech agt. Stoner, 19 N. Y., 28; Vischer agt. Yates, 11 Johns., 26; Story Eq. Jur., secs. 61, 298; Story on Ag., 198).

The plaintiff was swift in her steps to evade the judgment of this court pronounced against her lover, and made that lover her husband notwithstanding such judgment. The court, I think, now reposing on the maxim already quoted, exercises its highest prerogative in doing nothing. It leaves the parties equally in the wrong where it finds them. The plaintiff has made her bed, let her lie in it.

The defendant's exceptions to the findings of fact of the referee are overruled. His exceptions to the conclusions of law are sustained. Judgment is directed for the defendant upon the facts found, but not with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

Insolvent Life Insurance Company — Chapter 902, Laws 1869, as amended by Laws of 1880 — Practice on motion to confirm actuary's report — Power of the court over actuary's report.

Where on a motion on the part of the receiver of an insolvent insurance company to confirm the actuary's report upon the condition of such company, it is objected that the act of 1869, under which the order appointing the receiver was made is no longer in force, but was repealed or suspended by chapter 161 of the Laws of 1879:

Held, that the act of 1869, which provides for the deposit of securities with the superintendent of insurance for the benefit of registered policies and for their oversight and supervision is in no wise changed, altered or affected by the act of 1879.

It is further objected that the order appointing the receiver was unauthorized, because preliminary to the action being taken by the attorney-gen-

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eral, there was no report to that officer by the superintendent of insurance that the defendant was "in such a condition as to render the issuing of additional policies and annuity bonds by said company, injurious to the public interests:"

Held, that the manner of the making of such a report, whether it should be oral or written, is not prescribed, nor is it made necessary by the act, that the fact that such a report had been made should be stated to the court. There would seem to be no good reason to require it to be so stated, for after the proceeding is brought, the court must satisfy itself "by the allegations and proofs of the respective parties * * * that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter," before it can "issue an order enjoining and restraining the said company from further prosecution of its business, and * * * appoint a receiver of all the assets and credits of said company."

Held, second, that conceding the necessity of a report from the superintendent of insurance, the statute was in substance complied with. The only possible object of this provision in regard to the action by the superintendent of insurance was that the judgment of that officer should concur in the need of the proceeding, and if he does so concur, there would seem to be no good reason to require it in advance of action by the attorney-general, and that, therefore, the report made before the order appointing a receiver was sufficient.

Held, third, that this and every other objection should have been made upon the application, or at least to the order when it was resettled and re-entered. Instead of objecting the defendant expressly consented and affirmatively asked that the order which was made should be made, and upon its resettlement all its provisions were made to conform to the criticisms and wishes of the defendant. Under such circumstances it cannot now object to the validity of the order, for both statute and constitutional rights may be waived by a party and by a corporation, when it is a party, as well as by a natural person.

It is also objected that the actuary's report should be sent back because such actuary has not taken into account in making his report the future premiums to be received by the company upon its policies, as required by section 8 of the act of 1869:

Held, first, that while the report does not show a detailed valuation of such future premiums, it does not appear that they were not considered in reaching the conclusion of insolvency, for such report does most clearly exhibit all the resources of the defendant and all its liabilities, and states that the latter are in excess of the former \$559,271, and that "it is clearly impossible for the company to resume business." With such a result before him and the court, any detailed calculations of

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future premiums became unnecessary to enable either to decide that the company's assets could not meet its obligations as they matured.

Held, second, that prior to the amendment of the act of 1869, by the act of May 5, 1880, all the special term could then do was to send the report back to the actuary for correction; the statute gave the court no power to reject it. While it is true that the act of 1869, as amended by that of May 5, 1880, now requires the actuary's report to be confirmed by the court, whether the same is favorable or unfavorable as to the solvency of the company, yet the propriety of rejecting the actuary's report and thus practically keeping the company in life through a receiver must be considered.

Held, also, that the opinion of the general term in *People agt. Atlantic Mutual Life Insurance Company* (15 Hun, 84), and of the court of appeals in same case (77 N. Y., 336), are directly applicable, and that the report of the actuary should be confirmed and an order entered directing the conversion of the defendant's assets into money pursuant to section 8 of chapter 902 of the Laws of 1869, as amended by section 1 of the act of May 5, 1880.

Ulster Special Term, March, 1880.

MOTION on the part of the receiver and the attorney-general to confirm the actuary's report upon the condition of the defendant.

Messrs. Willard Bartlett and Henry J. Cullen, Jr., for receiver.

S. W. Knevals, for attorney-general.

Hamilton Harris, for superintendent of insurance.

Charles D. Lewis, for defendant.

Messrs. Barnes, Van Wyck and McAdam, for policyholders.

WESTBROOK, J.—The proceeding in this action was by summons and complaint by the attorney-general, in which the people were named as plaintiffs and The Globe Mutual Life Insurance Company was defendant, leave to bring such action having first been granted by a judge of this court.

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The complaint alleges the insolvency of the defendant, and the need of the appointment of a receiver to take care of its assets, and to distribute the same, and that the board of trustees of the defendant, after a full and complete investigation of its affairs had unanimously requested the attorney-general to bring such action, to obtain the appointment of a receiver thereof, and to wind up its business and distribute its assets.

On the 28th day of May, 1879, an order to show cause was granted by a judge of this court, returnable on the next day at a special term thereof, to be held at the City Hall, in the city of Albany, why the injunction prohibiting the doing of business by the defendant, its officers and agents, which was incorporated in the order to show cause, should not be continued "and why a receiver of the property and effects of the said corporation should not be appointed, pursuant to the provisions of the Revised Statutes and laws of this state, with all the powers and authority conferred upon receivers in such cases, and for such other and further relief as may be just."

On the return day of the order, the defendant appeared by Mr. William Allen Butler, one of its then attorneys and its counsel, the people by its then attorney-general (Hon. A. Schoonmaker), the superintendent of insurance by Mr. Hamilton Harris, and sundry policy-holders by Messrs. Hale and Knox.

Upon the application of the receiver the attorney-general presented a careful and exhaustive report of a committee of the board of trustees of the defendant, dated the 26th day of May, 1879, verified by their affidavit, by which it was most abundantly demonstrated that the corporation was hopelessly and irretrievably insolvent, and also a unanimous resolution of such board of trustees, adopted on the same day that the above report was made to them, asking the attorney-general to take the action and proceedings which he had then initiated, and was then pressing.

The defendant, by its then counsel, Mr. Butler, united with

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the attorney-general in his application, and vigorously opposed any delay in the proceeding, and strenuously and forcibly argued that the situation and condition of the company required prompt action by the court.

The then superintendent of insurance (Hon. John F. Smyth) appeared upon the motion, and by his counsel (Hon. Hamilton Harris), concurred in the necessity of the appointment of a receiver, and subsequently, and before the making or entry of any order upon such application, filed with the court, addressed to it and to the attorney-general, a written report recommending and advising the proceeding and application, and the appointment of a receiver.

Some policy-holders appeared also by Messrs. Hale and Knox, who asked for delay in the appointment of a receiver, They were heard, as they were not then parties to the proceeding or the action, by courtesy, but their request for delay was strenuously resisted by both the attorney-general and the counsel for the defendant, and was denied by the court.

The original order appointing Mr. James D. Fish, receiver, was filed and entered in the Albany county clerk's office on the 10th day of June, 1879. To its form and verbiage some objections were made by the attorney-general and the counsel for the defendant, and the same was resettled, and re-entered on the 17th day of June, 1879. Upon such settlement all parties were represented by counsel, and that order is now in the form and language desired and consented to by both the representative of the people and the representative of the defendant.

A reference to that order will show that the receivership was not designed to be a temporary one pending further litigation, but final and for the purpose of distributing the effects and property of the defendant. It recites fully the proceedings which have been herein detailed, among which are the appearance of the superintendent of insurance and his consent to and concurrence in the proceeding, both through counsel in open court, and his written report filed with the court, and

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the proofs presented, and then declares, "due deliberation being had in the premises, *and no objections having been taken to the form or mode of procedure*, and after hearing the allegations and proofs of the respective parties, and it appearing to the satisfaction of the court that the said defendant is insolvent, and that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting and issuing new obligations as authorized by its charter, and that the relief asked for in the order to show cause should be granted, it is ordered that the relief asked for in said order be, and the same is hereby granted; and it is further ordered that the said motion for an injunction and receiver be, and the same is hereby granted." The order then contains the usual injunction clause against the defendant, its officers and agents, and says: "It is further ordered, pursuant to the statutes in that case made and provided, that James D. Fish, of New York city, be, and he hereby is appointed receiver of the goods, chattels, property and effects, and of all the assets and credits of said company, the defendant, The Globe Mutual Life Insurance Company, to take charge of and manage the affairs of said corporation, its property and effects, *and under the order and direction of this court to distribute its assets according to law*, and for that purpose he is authorized to collect, sue for, and receive the debts and demands that may be due and owing, or which may hereafter fall due, and the property of every name, kind and nature that may legally or equitably belong to said corporation, subject to such further or other order in the premises as may hereafter be made by the court, and that as such receiver he be, and is vested with, and is entitled to all the estate, real and personal property, assets, credits and effects of the said The Globe Mutual Life Insurance Company, and shall possess all the power and authority conferred upon receivers according to law."

There are also various other clauses in the order requiring a bond to be given, and defining and prescribing the mode of

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executing the trust, all of which show with equal clearness, that the trust to which the receiver was appointed, and the order made were in pursuance of chapter 902 of the laws of 1869.

The receiver, after the entry of such order, appointed, with the approval of the superintendent of insurance, Frederick J. Phillips, actuary, to investigate and report to the court and receiver upon the condition of the defendant as required by section seven of said act of 1869. This appointment, though it must have been known to the officers and attorneys of the defendant, was not questioned, and the actuary proceeded for months, without objection by motion to the court, in the discharge of his duties.

The report of such actuary has been presented to the court, and from it it appears that the defendant's liabilities are largely in excess of its assets, and that it is unable to meet its engagements as they mature. To the confirmation of that report by the court, or the taking of any action thereon, the company now object for reasons, which will be examined.

First. It is objected that the act of 1869 under which the order appointing the receiver is claimed to have been made, is no longer in force, but was repealed or suspended by chapter 161 of the Laws of 1879.

It will be seen, on reference thereto, that chapter 161 of the Laws of 1879 does not affect chapter 902 of the Laws of 1869. The act of 1879 is simply amendatory of chapter 463 of the Laws of 1853. That appears from its title, and from its provisions which simply amend the title of the act of 1853, and also section 17 thereof. The act of 1869, which provides for the deposit of securities with the superintendent of insurance for the benefit of registered policies, and for their oversight and supervision is in no wise changed, altered or affected by the act of 1879. The correctness of this view is made apparent by the fact that chapter 168 of the Laws of 1880 recognizes the act of 1869 as still in force, by amending the eighth section thereof.

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Second. It is said that the order appointing the receiver was unauthorized because preliminary to the action being taken by the attorney-general, there was no report to that officer by the superintendent of insurance, that the defendant was "in such a condition as to render the issuing of additional policies and annuity bonds by said company, injurious to the public interests." To this objection several answers can be given.

1st. How does it appear there was no such report? The manner of the making thereof, whether it should be oral or written, is not prescribed, nor is it made necessary by the act, that the fact that such a report had been made should be stated to the court. There would seem to be no good reason to require it to be so stated, for, after the proceeding is brought, the court must satisfy itself "by the allegations and proofs of the respective parties * * * that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter," before it can "issue an order enjoining and restraining the said company from the further prosecution of its business and * * * appoint a receiver of all the assets and credits of said company" (*Section 7 of chapter 902, Laws of 1869*).

2d. Conceding the necessity of a report from the superintendent of insurance the statute was in substance complied with. The only possible object of this provision in regard to the action by the superintendent of insurance was that the judgment of that officer should concur in the need of the proceeding, and if he does so concur, there would seem to be no good reason to require it in advance of action by the attorney-general, and that, therefore, the report made before the order appointing a receiver was sufficient.

3d. But this, and every other objection, should have been made upon the application, or at least to the order when it was resettled and re-entered. Instead of objecting, the defend-

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ant expressly consented, and affirmatively asked that the order which was made should be made, and upon its resettlement all its provisions were made to conform to the criticisms and wishes of the defendant. Under such circumstances it cannot now object to the validity of the order, for both statute and constitutional rights may be waived by a party, and by a corporation when it is a party, as well as by a natural person (*The People* agt. *Brennan*, 3 *Hun*, 666 ; *Vose* agt. *Cockcroft*, 44 *N. Y.*, 415 ; *Houston* agt. *Wheeler*, 52 *N. Y.*, 641 ; *Baird* agt. *New York*, 74 *N. Y.*, 382 ; *The Attorney-General* agt. *Guar. Mut. Life Ins. Co.*, 77 *N. Y.*, 372). This point disposes of every objection as to the form and manner of procedure. It may not be improper, however, to add that the act of 1869 does not prescribe the mode of procedure by the attorney-general, whether it should be by action or petition, or whether it might not be a motion in a statute action to dissolve the corporation as a *quasi* interlocutory proceeding therein. Very clearly, however, by the service of a summons and complaint upon the defendant, the court obtained jurisdiction of its person, and of the subject-matter of the action the laws of this state gave it full cognizance. If any question of procedure was to be made, it was to be made on the original application, or at least upon the resettlement and re-entry of the order. With an order entered by consent more than a year ago, unappealed from and unvacated, the defendant is in no position to object to its validity.

Third. It is also objected that the actuary's report should be sent back because such actuary has not taken into account, in making his report, the future premiums to be received by the company upon its policies, as required by section 8 of the act of 1869.

To this it may be answered: 1st. That while the report does not show a detailed valuation of such future premiums, it does not appear that they were not considered in reaching the conclusion of insolvency, for such report does most clearly exhibit all the resources of the defendant, and all its liabilities,

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and states that the latter are in excess of the former \$559,271, and that "it is clearly impossible for the company to resume business." With such a result before him and the court, any detailed calculations of future premiums became unnecessary to enable either to decide that the company's assets could not meet its obligations as they matured; and 2d. Prior to the amendment of the act of 1869 by the act of May 5, 1880, the precise question had been passed upon by this court, both at special (*Matter of Atlantic Mutual Life Insurance Company*, 55 *Howard*, 77 and 82; 56 *Howard*, 391) and general term (*Same Case*, 15 *Hun*, 84), and also by the court of appeals (*Same Case*, 77 *N. Y.*, 336). It was held by all these courts, that all the special term could then do was to send the report back to the actuary for correction, and that the statute gave the court no power to reject it. While it is true that the act of 1869, as amended by that of May 5, 1880, now requires the actuary's report to be confirmed by the court, whether the same is favorable or unfavorable as to the solvency of the company, yet the propriety of rejecting the actuary's report and thus practically keeping the company in life through a receiver, must be considered. The opinion of this court at general term in *People agt. Atlantic Mutual Life Insurance Company* (15 *Hun*, 84), and of the court of appeals in *Same Case* (77 *N. Y.*, 336; see pages 340, 341), are directly applicable. When to the facts in the case referred to, we add those which this proceeding presents, that the company itself, by its entire board of trustees, admitted its hopeless insolvency, and fortified that opinion by a very formal and detailed report of a committee of its board verified by oath, and by counsel not only consented to a receiver, but urged upon the court the need of such an appointment without delay, it is very apparent that if this court should, by any act or order it might make, continue the company or its policies in life, the "freezing out the policy-holders," to which the general term of this court in the case referred to alludes, would be complete and perfect. For surely no holder of a policy of life insur-

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ance would pay a single dollar to continue it in force, and but a small proportion of the insured could pay the accumulation of premiums accrued during the pendency of these proceedings, if they desired so to do. Such an order, if made, would be practically one distributing the assets among the stockholders, and canceling all outstanding insurance obligations of the corporation.

The clear result of my examination is, that the report of the actuary should be confirmed, and an order entered directing the conversion of the defendant's assets into money, pursuant to section 8 of chapter 902 of the Laws of 1869, as amended by section 1 of the act of May 5, 1880.

N. Y. SUPERIOR COURT.

FREDERICK PUSTET *et al.* agt. WILLIAM P. FLANNELLY and
HUGH FLATTERY.

Interpleader—when motion for, should not be granted—Code of Civil Procedure, section 820.

The provision of the Code of Civil Procedure (*sec. 820*) for interpleader by order is a substitute for the old action of interpleader, and is governed by the same principles. It appeals to the equitable discretion of the court.

Such an application ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity.

Special Term, November, 1880.

MOTION for interpleader.

The plaintiffs, who are bankers, sue the defendants upon a promissory note for \$1,000, made the 11th of June, 1879, by the defendant Flannelly to the order of the defendant Flattery, payable fifteen months after date. This action was begun October 11, 1880.

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The defendant Flannelly acknowledges his obligation to pay the note, but says that one Samuel Marsh was appointed the receiver of the property of the defendant Flattery, in proceedings supplemental to execution, on or about the 21st day of June, 1880, and that the receiver has made a demand that the amount of the note now sued upon should be paid to him, claiming that the note belonged to him by virtue of his appointment as receiver. Flannelly now moves for leave to pay the money into court, and to have the receiver substituted as a defendant in his stead.

This motion is resisted by the plaintiffs, who recite that on the 7th day of September, 1880, and before the note was due, they received the note in question from the defendant Flattery, who was not only the actual possessor but the payee named in the note, and discounted it for him, then and there paying him the amount of the note, less the discount, to wit, \$998.60; that they then deposited the note with the Irving Bank for collection, where it was protested for non-payment. They make profert of their check with which they paid for the note.

Peter Condon, for motion.

C. W. Towne, for plaintiff, opposed.

RUSSELL, *J.* — The section of the Code (820) under which this motion is made reads as follows:

“The defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel is pending, may at any time before answer, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place and to discharge him from liability to either on his paying into court the amount of the

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debt, or delivering possession of the property or its value, to such person as the court directs. The court may, in its discretion, make such an order."

It has been uniformly held that this provision of the Code for interpleader by order is a substitute for the old action of interpleader, and is governed by the same principles. It appeals, as the closing paragraph indicates, to the equitable discretion of the court. According to all the cases reported such an application ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity (*Trigg* agt. *Hitts*, 17 *Abb.*, 436; *Johnston* agt. *Lewis*, 4 *Abb.* [*N. S.*], 150; *Mohawk and H. R. R.* agt. *Clute*, 4 *Paige*, 384; *Shaw* agt. *Coster*, 8 *Paige*, 347, 348; *Wilson* agt. *Duncan*, 8 *Abb.*, 354; *Doran* agt. *Fox*, 61 *N. Y.*, 264, 268).

In the last case cited the court say: "It must appear that there is some doubt — this means reasonable doubt — to which of the claimants the debt or duty belongs." In the case at bar the plaintiffs, in good faith and for full value, purchased the note in question from the nominal payee and the apparent owner without notice of any claim by anybody else. This made their title to that note good as against all the world (*Belmont Branch Bank* agt. *Hoge*, 35 *N. Y.*, 65; *S. C.*, *below*, 6 *Bosw.*, 553).

It is not pretended by the defendant nor by the receiver, who appears upon this motion, that the receiver ever had possession of the note in question, or any knowledge of its existence, until long after it became due, and until long after the plaintiffs' rights had fully matured. Section 2469 of the Code relating to the receiver's title to personal property expressly says, in the closing paragraph, that the "section does not affect the title of a purchaser in good faith without notice and for a valuable consideration." Upon a trial, if the same facts were presented by evidence as are here presented by affidavit, the court would at once direct a verdict for the plaintiffs. I can see, therefore, no reason why this money, to

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which the plaintiffs are clearly entitled, should be impounded to await the long delay which would be inevitable by reason of the great volume of business in the courts. The position and character of the parties make an additional reason why this money should not be so impounded. If the receiver were substituted as a defendant upon the petition of a debtor against whom the receiver made a claim, the plaintiff could not demand security for costs, nor could he probably obtain any judgment for costs as against the receiver, because the receiver, as such, is confessedly without funds from the trust estate with which to pay any such costs, and he might justly appeal to the court not to compel him personally to pay costs under such circumstances. On the contrary, it is the custom in these actions to award costs out of the fund in court to all the parties, unless there are special and strong reasons for not doing so. The result then of granting this motion would be to impound a considerable sum of money to which the plaintiffs are justly entitled, for an indefinite time subject the plaintiffs to additional expense in contesting a claim which must eventually be decided in their favor, and possibly to costs, great or small, in recovering what the court can now see is clearly their own.

It may be said that the conclusion above stated is drawn from the affidavits, and decides upon mere affidavits the merits of a controversy which it is the object of an interpleader to have decided upon sworn testimony at a trial. The answer to that suggestion is, that this is a motion made upon affidavits, and to be decided upon affidavits, in which the *bona fides* of the plaintiffs is not even questioned, and where the only response to their positive and circumstantial allegations is a mere denial of knowledge whether or not those allegations are true.

The motion is therefore denied, with ten dollars costs.

Thompson agt. Sullivan.

SUPREME COURT.

ELIZA THOMPSON agt. ALGERNON S. SULLIVAN, as public administrator, &c., of JOHN MOORE, deceased.

Executor or administrator — Remedies of a creditor upon the bond or other obligation of the intestate or testator secured by a mortgage.

An action can be maintained by a creditor against an administrator to recover the amount of bonds of the intestate, the payment of which are secured by mortgages executed by him upon real estate, and the fact that the creditor is the owner and holder of mortgages upon lands situated in the state of New Jersey, given as collateral security to the bonds, is no defense to the suit. The provisions of 1 Revised Statutes, 749, section 4, is no bar to such action.

Trial Term, November, 1880.

Ward & Jenks, for plaintiff.

Samuel S. McCutcheon, for defendant.

VAN VORST, J.—I do not think that the provisions of the statute (1 R. S., 749, sec. 4) were intended directly to interfere with the remedies of the creditor by action upon the bond or other obligation of the intestate or testator secured by a mortgage.

The section above referred to applies by its terms to the heir or devisee to whom the real estate descends or is devised, and directs that he shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator that such mortgage be otherwise paid.

I cannot say that the point directly presented in the case under consideration, in which the creditor proceeds by action at law to recover the amount of the bonds of the intestate, the payment of which are secured by mortgages executed by him upon real estate, has been passed upon.

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I am referred by counsel to no case resting upon facts directly presented, coincident with those now considered.

In controversies between the heirs and the executor or administrator of the testator or intestate, the chancellor has applied this statute, and has held that were debts of the testator are secured by mortgage on his real estate, such real estate in the hands of heirs or devisees constitutes the primary fund for the payment of such debts, and that only the balance of the debt of each mortgagee which cannot be collected by a purchase and sale of the mortgaged premises, is to be allowed as a claim to be paid *pro rata* out of the proceeds of the testator's personal estate (*Johnson agt. Corbett*, 11 *Paige*, 265; *Halsey et al., ex'rs, agt. Reed*, 9 *Paige*, 446).

But in *Wright agt. Holbrook* (32 *N. Y.*, 587), in commenting upon this statute, DAVIS, J., says: "The sole object of the statute was to change the rule of the common law under which the heir or devisee had the right to call upon the representative of the deceased to pay off the mortgage. It does not, by its terms, purport to affect the rights of creditors, but simply to establish a rule of liability as between devisees or heirs and the personal representatives. When there is, as in this case, a personal liability by contract, to which the mortgage is a collateral security, it was not the design of the statute to deprive the party of his rights to enforce that liability, nor was it intended to compel a resort to any mode of marshalling assets for the purpose of adjusting the equities as between the representatives and third parties." And *Rice agt. Harbeson* (2 *Sup. Ct., T. & C.*, page 4) announces the same doctrine (*See, also, Roosevelt agt. Carpenter*, 28 *Barb.*, 426).

Following these last cited cases, I shall hold that the action in the creditor's favor upon the bond can be maintained, and that the fact that the creditor is the owner and holder of mortgages upon lands situated in the state of New Jersey, given as collateral security to the bond, is no defense to this action.

It is not necessary to decide at this time how and out of

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what property the plaintiff's judgment may be enforced. That question may arise when the plaintiff shall move in that direction, and if the defendant shall show any reason in equity to restrain the plaintiff's efforts in that regard, he will be at liberty to do so.

There should be judgment for the plaintiff for the amount of his bond with costs.

SUPREME COURT.

SEYMOUR JONES agt. WILLARD PLATT.

Order of arrest — Defects in affidavit, &c., for which the order will be set aside — Code of Civil Procedure, sections 561, 562, 559, 812 — Rules 2-25.

The affidavit upon which the order of arrest was founded was made upon information and belief, without stating the source of such information; the application was made *ex parte*, and the moving affidavit did not state whether any previous application had been made. The order of arrest and the undertaking were not indorsed with the office address or place of business of plaintiff's attorney, nor was the order of arrest subscribed by plaintiff's attorney, and but one surety made affidavit of justification. On motion by defendant's attorney to vacate order of arrest, plaintiff's attorney asked leave to amend:

Held, that leave to amend should be denied and motion to vacate should be granted.

Special Term, November, 1880.

MOTION to vacate order of arrest

The affidavit upon which the order was founded was made upon information and belief, but did not state the sources from which the affiant obtained his information.

The application for the order of arrest was made *ex parte*. The moving affidavit did not state whether any previous application had been made for such an order (*Rule 25*).

The order of arrest and the undertaking upon which it was

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founded were not indorsed with the office address or place of business of plaintiff's attorney (*Rule 2*).

The order of arrest was not subscribed by the plaintiff's attorney (*Code of Civil Procedure, sections 561 and 562*).

But one surety made affidavit of justification (*Code of Civil Procedure, sections 559 and 812*).

Backus & Olney and *Oswald P. Backus*, for motion, cited *Dreyfus* agt. *Otis* (54 *How. Pr.*, 405); *Hecht* agt. *Silvain* (9 *W. D.*, 313; 77 *N. Y.*, 589); *Rule 25, Supreme Court*; *Gouroud* agt. *Trust* (17 *Hun*, 578); *Rule 2, Supreme Court*; *Kiely* agt. *Sheehan* (76 *N. Y.*, 325); *Kilmer* agt. *Hathorn* (78 *N. Y.*, 228); *Code Civil Procedure, sections 561 and 562*; *Thompson* agt. *Fridenburg* (54 *How.*, 519); *Code Civil Procedure, sections 559 and 812*; 54 *Howard*, 519.

Joseph I. Sayles, opposed, asked leave to amend.

MERWIN, *J.* — Leave to amend denied and motion granted, with ten dollars costs.

N. Y. SUPERIOR COURT.

JOHN FRANKEL agt RICHARD ELIAS.

Sheriff — *Who under execution has sold property as belonging to defendant, when called upon to account what he may allege.*

Though, as a general rule, a sheriff who under execution has levied upon and sold certain property as belonging to the defendant in the execution, will not be permitted, when called upon to account for the proceeds, to allege that the property in fact did not belong to said defendant. Yet, when upon motion to compel payment of surplus such defendant has put himself on record, under oath, that the property taken belonged to his wife, and that he had no interest therein, his right to recover the alleged surplus is not so clear that the court should enforce it on a summary application.

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Such motion does not come under the one year limitation prescribed by section 385 of the Code of Civil Procedure, but under the three year limitation, as prescribed by section 383.

Special Term, November, 1880.

MOTION to determine amount of surplus remaining in the hands of the sheriff after sale on execution, and to compel payment thereof to defendant.

FREEDMAN, J. — Section 385 of the Code of Civil Procedure, which provides that an action against a sheriff or coroner upon a liability incurred by him by doing an act in his official capacity, or by the omission of an official duty, shall be brought within one year, expressly excepts an action for the nonpayment of money collected upon an execution. The time for bringing such an action is limited by section 383 to three years, and the limitation applies not only to the plaintiff in the execution, but to all persons having a right of action against a sheriff or coroner arising out of the collection of moneys upon an execution. Although, therefore, eighteen months have elapsed since the sale, the defendant is in time, and it is unnecessary to determine whether subdivision 4 of section 414 — which provides that the word “action,” as above used, is to be construed, when necessary, as including a special proceeding, or any proceeding therein or in an action — includes such a motion as is now made.

As to the merits of the motion it is undoubtedly the general rule that a sheriff who, under an execution, has levied upon and sold certain property as belonging to the defendant in the execution, will not be permitted, when called upon to account for the proceeds, to allege that the property in fact did not belong to the said defendant. But the difficulty in this case is that the defendant who, by this motion, seeks to recover an alleged surplus remaining in the hands of the sheriff after the satisfaction of the execution and the payment of all legal fees and disbursements, in verifying the complaint in an action

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brought by his wife against the sheriff for the alleged unlawful taking of the same property from her, put himself on record as stating under oath that the property taken belonged to his wife, and that he had no interest therein. Having thus solemnly committed himself by his own voluntary act, and the said action being still pending, his right to recover the alleged surplus is not so clear that the court should enforce it on a summary application. He should be left to proceed by action. For the same reason it is unnecessary to determine the amount of the surplus at the present time.

Motion denied, with ten dollars costs.

SUPREME COURT.

WEARE C. LITTLE *et al.* agt. JAMES COYLE *et al.*

Sheriff's fees—Code of Civil Procedure, section 3307, subdivision 4—How much sheriff entitled to as term fees.

Under subdivision 4 of section 3307 of the Code of Civil Procedure the sheriff is entitled to three term fees after that Code took effect, although he had previously received three term fees.

Albany Circuit and Special Term, October, 1880.

Mr. Eugene Burlingame moved to put this cause on the calendar, which the clerk, in making up, had refused to do, because the fee specified in subdivision 4 of section 3307 of the Code of Civil Procedure, which took effect September 1, 1880, was not paid to the clerk.

Mr. Burlingame showed, by affidavit, that before September 1, 1880, the sheriff had been paid more than one dollar and fifty cents calendar fees in this action.

Nathaniel C. Moak appeared for James A. Houck, the sheriff.

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OSBORN, *J.*—The section has reference to the fees of sheriffs, and amends in important particulars the fees previously allowed.

Subdivision 4, which has reference to the question presented on this motion, reads as follows :

“For notifying jurors to attend a trial term of a court of record, fifty cents for each cause placed on the trial calendar for a trial by jury, to be paid by the party first putting the cause on the calendar for that term.”

“But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in an action.”

“The clerk shall not put a cause on the calendar for trial by a jury until the fee specified in this subdivision is paid to him, for the use of the sheriff.”

This is all the subdivision necessary to be quoted to determine the motion.

The question presented is one of embarrassment, and has given me considerable difficulty. What construction shall be placed on the language employed? What was the intent of its framers? I have not been referred by counsel, nor have I been able to find any adjudicated case to give me any particular aid in arriving at a correct determination of this difficulty. But it will be found, I apprehend, to be one of the very many vexatious questions that will necessarily arise from such a radical change as the new Code has made. As a word or two interpolated into this subdivision would have made its meaning entirely clear, I can see no excuse why the framer thereof should leave its construction at all difficult.

Prior to this the provision made for the sheriff by statute, for the same service, was as follows :

“For summoning a jury to attend any court, fifty cents for each cause noticed for trial at such court and placed on the calendar thereof for trial.”

Under this statute no matter how many times the cause was noticed for trial and on the calendar, on each occasion the sheriff was entitled to charge fifty cents. There was no limi-

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tation as to the number of times, or the amount to be received by the sheriff in the aggregate. Doubtless it often occurred in counties where the calendars were large, that a jury cause would be noticed and on the calendar ten, fifteen, possibly twenty times. No matter what the number might be ; on each occasion the sheriff was entitled to fifty cents.

The object then of this subdivision is obviously to limit the sheriff's calendar fees to one dollar and fifty cents, and the provision of payment to the clerk for the use of the sheriff, was for the sheriff's protection. Indeed this is the object expressed by the revisers in their notes upon this subdivision.

Nor shall this subdivision apply to or have any reference to actions commenced prior to September 1, 1880, and in which calendar fees to the sheriff had already been paid to the full amount fixed by this limitation, nor shall it be construed as if it read, "But the sheriff shall not be entitled to more than one dollar and fifty cents for services hereafter rendered for notifying jurors, &c., in one action." I incline to the opinion that it must be construed as having a prospective effect only. That is, after September 1, 1880, the clerk must exact for the sheriff the sum of fifty cents from the party first putting or asking a jury case to be placed upon the calendar, and so on at each term thereafter that such cause is placed on the calendar until the sum of one dollar and fifty cents is paid.

For such services by the sheriff, rendered prior to September 1, 1880, the law gave him fifty cents for every jury case placed on the calendar. He was entitled to demand and recover that sum whenever and as often as such service was rendered, from the party liable therefor ; and this without any limitation as to the number of times. But now that the original statute is amended, he cannot, after such amendment takes effect, demand or receive in any one action more than the sum of one dollar and fifty cents, no matter how many times he may be called upon to summon jurors before the cause is reached or disposed of. This is in harmony with the general rule that statutes are not to have a retroactive effect. A different construction

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would be attended with great difficulties. Take the case in which this motion is made. The attorney desires his cause on the calendar. When the clerk exacts the fee for the sheriff, the attorney says "I have already paid one dollar and fifty cents and perhaps more to the sheriff in this action." How can the clerk know whether this be so or not? Must he rely on the statement of counsel? If not, what proof must be furnished him? The construction I have given avoids this confusion and difficulty. The clerk will now be obliged to keep a record of each payment in each action and will at all times show, or should when the sheriff has received, or the clerk for him, all that he, the sheriff, is entitled to.

As I have stated, the question is one of difficulty, unnecessarily made so, as the change of a few words or the addition of a few words would have left no ground for any difference of opinion as to what was intended. As it is, we must construe it as best we can.

For the reasons thus hurriedly expressed, but not without giving to the question considerable reflection, I think the action of the clerk right, and the motion must be denied, but without costs.

SUPREME COURT.

WILLIAM H. BAKER, as receiver, &c., respondent, agt. JOHN C. VAN EPPS and others, appellants.

Receiver — Supplementary proceedings — Receiver may employ an attorney of judgment creditor.

A receiver in supplementary proceedings may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted (*Overruling Branch agt. Branch*, 49 How., 196; and *Cumming, Receiver, agt. Edgerton*, 9 Bosw., 685).

Fourth Department, General Term, October, 1880.

Before MULLIN, P. J., RUMSEY and TATCOTT, JJ.

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THIS is an appeal from an order made at Monroe special term denying a motion made by defendant John C. Van Epps to set aside the summons and dismiss the action as to him on the ground of irregularity, to wit, that the plaintiff's attorney in this action is and was the attorney of the judgment creditor in the action, and proceedings supplementary to execution therein, by which the plaintiff was appointed receiver of the property, &c., of John C. Van Epps (*See* 58 *How.*, 401).

Fanning & Williams, for appellant. (1.) Plaintiff having been appointed receiver in supplementary proceedings, and such being proceedings in the actions, it was irregular for Mr. E., attorney for judgment creditor, to be attorney for receiver, plaintiff herein (*Branch* agt. *Harrington*, 49 *How.*, 196; *Cumming*, *Receiver*, agt. *Edgerton*, 9 *Bosw.*, 185; *Ray* agt. *Macomb*, 2 *Edwds. Ch.*, 165; *Ryckman* agt. *Parkins*, 5 *Paige's Ch.*, 543-545; *Warren*, *Receiver*, agt. *Sprague*, 4 *Edwds. Ch.* [146]; *In re Ainsley*, *Receiver*, 1 *id.*, 576; *Baker's Sup. to Riddle on Sup. Prods.*, pp. 56, 57).

(2.) This appeal is brought to test above citations.

The reason of the rule rests in public policy. The attorney of parties is bound in duty to his client to watch the proceedings of the receiver and see that he faithfully discharges his duty. To be attorney for receiver might cause inconsistent and conflicting duties.

A receiver represents not only debtor but creditor also (9 *Bosw.*, 685, *supra*; *Porter* agt. *Williams*, 9 *N. Y.*, 142-149).

(3.) Appellant John C. Van Epps, judgment debtor, not having appeared in this action or waived his rights in any way, had the right to take advantage of the irregularity.

(4.) The same rule applies in case of receiver in supplementary proceedings as in that of other receivers (*Section* 298, *old Code*; 9 *Bosw.*, 684, *supra*).

(5.) The special term virtually concedes the correctness of foregoing by denying motion *simply* on the ground that "all

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defendants did not join in the application." But this was erroneous because :

(a.) His codefendant was a stranger to suit and proceedings on which receiver was appointed, and could not take advantage of the irregularity (9 *Bosw.*, 684, *supra*; *Warren* agt. *Sprague*, 11 *Paige*, 200).

(b.) It does not appear from moving papers that the codefendant has ever been served with process, or is in a position to join in the motion.

(c.) There are no counter-affidavits, hence the allegations of the moving papers are admitted.

(6.) The order appealed from should be reversed, with costs, against plaintiff receiver, personally, as it was brought without order of the court.

Angus McDonald, for respondent.

BY THE COURT. — The order appealed from affirmed, with ten dollars costs and disbursements. *Held*, that in supplementary proceedings the receiver can employ the attorney of the party for whose benefit the proceedings are instituted.

NOTE. — The plaintiff was receiver under proceedings supplementary to execution, and no opinion was written. The rule that a receiver shall not employ the attorney of either party in the action in which he was appointed as his counsel was adopted when each party claimed the fund, and the selection by the receiver of counsel for either party to the action would tend to give such party an unfair advantage. In supplementary proceedings the fund belongs to the judgment creditor, so far as may be necessary to satisfy his judgment, so no controversy can arise as to the disposition of it after the fund is reached. The action is prosecuted by the receiver practically for the benefit of the judgment creditor, who is responsible for the costs of it, and under such circumstances there is no reason why he should not have the selection of the attorney by whom the proceedings are to be conducted (*Supreme Court Rule 85*). For this reason the general term *held* that the receiver acted properly in employing the attorney of the judgment creditor to prosecute the action and refused to set aside the proceedings. [REP.]

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

Life insurance company — Code of Procedure, section 430 — Duty of attorney-general under — Practice as to winding up insolvent insurance companies — Waiver.

A life insurance corporation which is bound by law to hold its property and funds for the benefit of the insured, when it, by the deliberate and fraudulent action of its officers and trustees, has wasted and misappropriated its entire capital, and several thousand dollars in addition of moneys received from policyholders, it has, then, offended against not only some, but against all "the provisions of the act or acts creating * * * such corporation."

Section 430 of the Code of Procedure expressly declares it to be the duty of the attorney-general, "on leave granted by the supreme court or a judge thereof," to bring an action "for the purpose of vacating the charter, or annulling the existence of a corporation, other than a municipal," which has thus conducted itself.

The power conferred, and duty imposed, upon the attorney-general by this section of the Code of Procedure has not been in any wise impaired or affected by the act of 1853, or any other statute.

Where, in pursuance of the provisions of this section, the attorney-general commenced this action in the supreme court by the service of a summons and complaint upon the defendant, for the purpose of enjoining further business by it as a life insurance company and to distribute its assets, and upon an order to show cause, the defendant appearing by its counsel, an application for the appointment of a receiver was heard; the court hearing the allegations and proofs of the respective parties, and the result of the application being an order made by the court appointing a receiver of the defendant. The counsel for the defendant not only took no objection to the form or manner of procedure, but formally united with the attorney-general in the application and strenuously argued and urged the need of prompt action by the court, as asked for by that state official:

Held, that this appearance in the action and consent to the order waived all irregularities, if any existed, and foreclose the defendant from all objections, constitutional or otherwise. An artificial being, as a natural one, when summoned before a tribunal having, by the law of the land, jurisdiction of the subject-matter of the relief asked, and which by the

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service of process has also obtained jurisdiction of its person, must object at the proper time or be foreclosed from making any.

The objections made to the constitutionality of the act of 1869 considered and *held* to be untenable.

Held, also, that the order appointing the receiver is valid under the act of 1869.

The order entered having been held to be valid, is irrevocable by consent of the attorneys for the parties. When individuals have voluntarily placed their property in the hands of a receiver made by the court, by no consent of their's can he be removed and the trust abrogated. The court has assumed a duty which is beyond their control. This doctrine is especially applicable to a proceeding against a life insurance corporation, because the course of procedure is all defined by statute.

Albany Special Term, June, 1880.

TRIAL by the court without a jury. The cause, though on the calendar of the Albany circuit and special term, was heard by the judge holding such circuit at his chambers in Kingston, by the agreement of parties.

S. W. Knevals, for attorney-general.

Hamilton Harris, for superintendent of insurance.

G. W. Wingate and *W. Bartlett*, for receiver.

Henry E. Knox, for policyholders.

Augustus Van Wyck, for policyholders.

A. Schoonmaker, for policyholders.

Charles T. Lewis, for defendant.

WESTBROOK, J. — By permission of a judge of the court, first had and obtained, the attorney-general of the state commenced this action in the supreme court by the service of a summons and complaint upon the defendant, for the purpose

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of enjoining further business by it as a life insurance company, and to distribute its assets.

The complaint averred the organization of the company in the year 1864, and the prosecution and the carrying on by it of the general business of life insurance. It further alleged a gross mismanagement of its affairs by the officers thereof, a diversion of the assets to the use of its officers and trustees, and its insolvency for more than a year. It also declared that a new board of directors had been elected in March, 1879, with a view to its re-organization, but that such board after a careful investigation of its affairs had found a deficiency in its assets of more than \$700,000, and that as a consequence thereof, its business could no longer be continued, and that they had unanimously resolved, that the attorney-general should be requested, for the protection of its policyholders, to take proceedings for the appointment of a receiver. A perpetual injunction against the continuance of its business by the defendant was asked for, and also the appointment of "a receiver of its property and effects * * * pursuant to the provisions of the Revised Statutes and Laws of this state." A judgment dissolving the corporation was likewise demanded, and also an injunction restraining the defendant, its officers and agents, *pendente lite*, from doing business, but no other demand for a receiver was made except as just stated.

Upon an order to show cause, at a special term of this court, held in the city of Albany, the defendant appearing by its counsel, Wm. Allen Butler, an application for the appointment of a receiver was heard. The superintendent of insurance, by Hamilton Harris, his counsel, likewise appeared, and united with the attorney-general in the application. The court then heard "the allegations and proofs of the respective parties." Such proofs consisting of a very full and detailed report by a committee of the board of trustees of the defendant, verified by their oaths, which showed its exact condition, which was one of most hopeless insolvency,

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produced by careless if not fraudulent mismanagement of its affairs by its officers and trustees, and also a resolution of its board of trustees passed only three days before the application, asking the attorney-general to place its affairs, property and effects in the hands of a receiver. The counsel for the defendant not only took no objection to the form or manner of procedure, but formally united with the attorney-general in the application, and strenuously argued and urged the need of prompt action by the court as asked for by that state official. The result of the application was an order made by the court, entered on the 10th day of June, 1879, appointing Mr. James D. Fish receiver of the defendant. This order was resettled by the court, all parties appearing on such resettlement, and a new order entered on the 17th day of June, 1879, which is in exact conformity as to its terms and provisions, except as to the personality of the receiver, Mr. Fish, with the wish and views of the then attorney-general (Hon. A. Schoonmaker), and the counsel (Wm. Allen Butler) of the defendant.

A much more full statement of the proceedings and of the orders entered in this action, are given in a previous opinion rendered therein upon the application to confirm the report of the actuary, appointed in conformity with section eight of chapter 902 of the laws of 1869, to which reference is hereby made (*See ante*, 57). It is sufficient now to say, what in the former opinion is established, that the order appointing the receiver, provides for no receiver *pendente lite*, but that it is a final order for distributing the property and effects of the company, pursuant to the act of 1869, and it is proper here also to state that neither the complaint nor order to show cause asked for a temporary receiver until a final decree or judgment was made, but one which should take and hold the assets for distribution, and who should proceed at once to wind up the business of the defendant pursuant to the provisions of law.

On the 26th day of February, 1880, over eight months after

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the order had been entered in the action, as has been stated, the defendant served, and the attorney-general accepted an answer therein, which puts in issue the insolvency of the defendant.

Orders have also been made allowing certain policyholders to intervene and become parties to the action, (*Att'y-Gen. agt. North Am. Life Insurance Co.*, 77 *N. Y.*, 297), some of whom have appeared therein, and by answer insist that after the order aforesaid had been entered, it was incompetent for the attorney-general and defendant to make an issue for trial, and they demand judgment affirming and validating the former order.

The issues in the action were noticed for trial at the Albany circuit, and were by consent of parties heard at the judge's chambers, in the city of Kingston, before him without a jury.

On such trial the plaintiffs put in evidence all the proceedings and orders in the action, and also the report of the committee of the board of trustees of the defendant, of which mention has already been made, and the resolution of the said board of trustees requesting the attorney-general to place it in the hands of a receiver, adopted on the 26th day of May, 1879.

After this evidence had been introduced, it was moved in behalf of the plaintiffs, the policyholders who had intervened, and the receiver, that there should be a judgment in the action affirming the past action, which the defendant resisted, and a counter motion was made in its behalf, to dismiss the whole proceeding as irregular and void. The motion on the part of defendant will be first examined, for if that be sustained, there can manifestly be no judgment affirming past action, as claimed by the other parties.

The general power of the supreme court over corporations will not be disputed. On leave granted by a justice of this court, as has already been stated, the attorney-general, by summons and complaint duly served, brought the defendant within its jurisdiction. The allegations of the complaint

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were to the effect (they have already been given, but are restated in this connection) that the defendant, the organization of which was duly alleged, had grossly mismanaged its affairs, and diverted its income and funds received in trust for the benefit of policyholders, to the use and benefit of its trustees and officers, by reason of which the defendant was insolvent, and had so continued for more than a year, thus violating the provisions of law, under which it was incorporated, in not keeping its assets in amount sufficient to insure its outstanding risks, and justifying the further continuance of the business of insuring lives, granting annuities and incurring new obligations. That the board of trustees of the defendant, had caused a careful examination into its affairs, by a committee of its members, who reported a deficiency of assets to meet its liabilities of \$700,000, and that in consequence thereof, such board had unanimously asked the attorney-general to take action to wind up its affairs and business.

It is hardly necessary to argue that a life insurance corporation which is bound by law to hold its property and funds for the benefit of the insured, when it, by the deliberate and fraudulent action of its officers and trustees, has wasted and misappropriated its entire capital, which was \$100,000, and \$600,000 in addition of moneys received from policyholders, that it has then offended against, not only some, but against all "the provisions of the act or acts creating * * * such corporation." Section 430 of the Code of Procedure, expressly declares it to be the duty of the attorney-general, "on leave granted by the supreme court, or a judge thereof," to bring an action "for the purpose of vacating the charter, or annulling the existence of a corporation, other than a municipal," which has thus conducted itself. Are the provisions of this section of the Code repealed? In *Fisher agt. The World Mutual Life Insurance Company* (47 Howard, 451); in *Attorney-General agt. The Continental Life Insurance Company* (53 Howard, 16), and in *Attorney-General agt. The*

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North American Life Insurance Company (56 Howard, 160), no such question was before the court. The point determined in these cases was, that no creditor or stockholder of a life insurance corporation, could bring an action to dissolve it and distribute its property and effects, because the provisions of the Revised Statutes, on which said right depended had been repealed; but these cases do not hold that the power conferred, and duty imposed upon the attorney-general by the Code of Procedure, had been in any wise impaired or affected. A reference to those cases will show, that the court reached the conclusion it did upon the language of the eleventh section of chapter 463 of the Laws of 1853, which provides that life insurance companies "shall be subject to all the provisions of the Revised Statutes in relation to corporations, so far as the same are applicable, except in regard to annual statements and other matters herein otherwise specially provided for." From this provision it was argued, and the conclusion reached, that as a mode of procedure to wind up a life insurance corporation was prescribed by the act of 1853, which was "'otherwise' or different from that prescribed by the Revised Statutes," that the provisions of the latter allowing a stockholder or creditor to bring such an action were repealed. The power of the attorney-general as conferred by the Code was not before the court, and it is obvious, if it had been, that the argument by which the conclusion was reached in these cases would have been entirely inapplicable. No statute to which our attention has been called, or which we have been able to find, has at all affected the provisions of the Code. They are important enactments governing the conduct, and prescribing the duties of a state officer, the attorney-general of the state, the protector of its rights, and largely the prosecutor before the courts of all persons and corporations who offend against its laws. Powers conferred upon him for such grave and important objects should not be, and cannot be repealed by implication (*Anderson agt. Van Tassel*, 53 N. Y., 631); and as no statute touches them, they must be held to be in full force.

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It is claimed, however, that chapter 161 of the Laws of 1879, which amends chapter 463 of the Laws of 1853, by declaring that "all acts or parts of acts inconsistent herewith are hereby repealed," has swept away the provision of the Code under which the attorney-general seeks to sustain his action. It will be observed that the act of 1879 does not declare that the only mode of dissolving a life insurance company shall be under and in pursuance of the act of 1853 as thereby amended, but only acts inconsistent therewith are thereby repealed. It is a well-known maxim that repeals, by implication, are not favored in the law, and this is especially true when applied to the case of a public officer who has had power conferred upon him for the general good (*Anderson agt. Van Tassel*, 53 N. Y., 631). The Code and the act of 1853 are not necessarily inconsistent. The latter provides a speedy and summary method of dealing with a life insurance corporation, upon the report of the superintendent of insurance, when the assets of such company have become reduced to the extent specified in such act; and the former empowers and requires the attorney-general to bring a formal suit for the dissolution of all corporations, without any action by the superintendent of insurance, when they have offended in regard to the matter therein specified. By the act of 1853, as amended in 1879, the attorney-general initiates proceedings whenever the assets of the corporation "are insufficient to re-insure its outstanding risks," which fact has been communicated to him by the superintendent of insurance; and by the Code he is directed to bring an action, by the permission of this court, or of a judge thereof, for the dissolution of a charter of any corporation, a life insurance one or any other, which offends against sundry provisions of law specified in the enactment. A statement of the provisions of the act, and these of the Code show the two are not inconsistent. If the attorney-general had sought to dissolve the corporation because its assets were "insufficient to re-insure its outstanding risks," or that it was in a condition in any other respect which by the amended act

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of 1853 works a dissolution, he should proceed thereunder; but a dissolution of the corporation and a receiver is asked for no such reason. The complaint avers a much worse condition of affairs. Plain and gross violations of official duty by officers are charged. Misappropriation and diversion of funds and property are alleged, and also absolute insolvency, continued for more than a year, so that it can be truly said, if the allegations are true, that the corporation has offended "against * * * * the provisions of the act or acts creating it."

It is also easy to suppose a case, for which no provision is made by the act of 1853, and which clearly should work a dissolution of the corporate life. The company might embark in other enterprises contrary to the terms of its charter, and yet its capital might not be so far impaired as to justify action under that statute. Where then is the remedy? Manifestly in the Code, which directs an action in just such a case, for in changing its business it not only violates the purposes of its creation, but also exercises "a franchise or privilege not conferred upon it by law," and for either (*Code, section 430*) it forfeits its life.

Looking then not only at the language of the act of 1853, and that of the Code, but at the obvious intent of both, it is plain that the two are not inconsistent, and that the former does not repeal the latter.

It has now been shown that the complaint does allege a complete cause of action against the defendant, and that the attorney-general had full authority to institute it. The jurisdiction of the court was complete, both of the subject-matter of the action, and of the parties. When the defendant came before it, upon the order to show cause for the continuance of the injunction and the appointment of a receiver, it (the defendant) had the right to make any objection to the regularity of the proceeding, the jurisdiction of the court, the sufficiency and competency of the evidence offered, and to the form of the order, it pleased. If the application for the

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appointment of a receiver was irregular as a *quasi* interlocutory proceeding in an action brought to dissolve it pursuant to the Code — if it should have been an entirely independent application, and not one in a suit already pending, or if, being in an action, there was need of an issue and a formal trial, in the usual way, such point should have been made to the court — for an artificial being, as a natural one, when summoned before a tribunal, having by the law of the land jurisdiction of the subject-matter of the relief asked, and which by the service of process has also obtained jurisdiction of its person, must object at the proper time, or be foreclosed from making any. No objection of any kind was, however, taken. A summary examination was made as to the condition of the defendant, the proof offered was unobjected to, and a permanent injunction against the continuance of its business and exercising its franchises was granted, and a receiver appointed to take title to its property, and distribute the same under the direction of the court, and all was done with its express assent and active co-operation. This appearance in the action, and consent to the order waived all irregularities, if any existed, and forecloses the defendant from all objections, constitutional or otherwise, as is most abundantly sustained by authority (*People agt. Brennan*, 3 *Hun*, 666; *Vose agt. Cockcroft*, 44 *N. Y.*, 415; *Houston agt. Wheeler*, 52 *N. Y.*, 641; *Baird agt. The Mayor, etc., of N. Y.*, 74 *N. Y.*, 382; *Attorney-General agt. Guar. Mutual Life Insurance Co.*, 77 *N. Y.*, 272; *Palmer agt. Phoenix Life Ins. Co.*, *N. Y. Weekly Digest*, vol. 10, page 179).

The learned counsel for the defendant has ingeniously argued at some length, that the trustees and officers of the defendant had no power to dissolve its corporate life by consent, and that the statutes point out the mode of dissolution when the application is in their behalf. This is true, but we fail to see the pertinency of the argument to the case before us. There has been no order made dissolving the corporation, and if there had been, the argument would be equally

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fallacious. The proceeding or action is one against and not by the corporation, and while it is true that the statutes of this state define the course of procedure for a dissolution of a corporation on its application, it is also true that there is no rule of law which requires a corporation to resist and defend every suit or proceeding against it, without regard to its merits. If there is, it follows that in every action or proceeding to which it is a party, no admission of a fact, whether made by the pleading or given in an open court, is of any force or value. No action was based upon any application by the defendant; that was all founded upon the proceedings initiated by the attorney-general, and the propriety of the order was demonstrated by the evidence submitted to him, which evidence was not controverted because it was, it must be assumed, known to be true by those representing the defendant. The question to be decided assumes no such shape as to make the objection applicable. No receiver has been appointed, nor order made at the instance of the defendant, but on the application of the attorney-general, the laws of the state giving to the court jurisdiction of the subject-matter, and the service of process on the defendant conferring jurisdiction of its person, on competent testimony. The want of proper objections, if any existed, under such circumstances, waives the same and prevents the defendant from claiming their benefit.

If then this proceeding be regarded as an action purely, there would be no difficulty in upholding it and sustaining all past action, but such past action is equally sustainable under chapter 902 of the act of 1869. Before entering, however, upon the discussion of this question, it will be necessary to examine certain objections which have been made to the constitutionality of that statute.

There is no doubt as to the power of the legislature to alter the charter of any corporation existing under its enactments, for it is expressly provided by the constitution of this state (*article 8, sec. 1*), "all general laws and special acts"

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relating to the formation of corporations "may be altered from time to time or repealed." If the legislature had by the act of 1869, for the greater security of policyholders, required life insurance companies to deposit securities in the department of insurance, and had provided more summary methods of dealing with them, it is not seen how the statute would for that reason have been unconstitutional. But there is nothing compulsory in the act of 1869. It allowed the defendant, or any other corporation of like character, to do business under its provisions. The act of the defendant was purely voluntary, and it is not for the artificial being which, by its proper corporate act, availed itself of a statute, to shield itself from its operation, under the pretense that in doing so it did an act which persons interested in its assets could have forbidden. This is not a suit or proceeding between the corporation and its stockholders, or between it and policyholders; if it was, then perhaps the argument of the defendant would be more plausible, but it is one between it and the state, whose laws it is alleged to have violated. For years, without objection from any person interested in its affairs, the defendant did business under the act of 1869, and it is now too late for the being, which has offended, to object that the provisions of that statute, which guard the rights of policyholders and the state, cannot be enforced against it.

Neither has any unconstitutional method of ascertaining the condition of life insurance companies been provided by the act of 1869. The same tribunal, the supreme court of the state, which has always determined questions of solvency, and those appertaining to the continuance of its corporate life, still determines all such issues. The report of the actuary, required by section eight of the act, as to its condition, determines no issue made by the proceeding, but only assists in determining the course which the court shall adopt in the distribution of its assets, whether outstanding contracts shall be met as they mature by continuing policies in life for that purpose, or whether the property shall be at once turned into

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cash and its proceeds distributed. For even the criticism made upon the provisions of the act of 1869, as originally passed, is no longer available, because now, by the act of 1880 (*chap. 168*), the court must pass upon every question, and the report of the actuary, like that of any skilled expert, simply aids that tribunal in doing full and complete justice.

Since the matters discussed in this opinion were argued, and also since the foregoing portion thereof was written, all the objections made to the constitutionality of the act of 1869, have been considered and overruled by the court of appeals, *In the Matter of Attorney-General agt. The North American Life Insurance Company*, to which case, as yet unreported, reference is now made as conclusive thereon.

Having considered the constitutional objections made to the act of 1869, it remains to determine whether the order appointing the receiver was not valid under said act. A reference thereto (*chapter 902, section 7*), shows that the court acts upon the application of the attorney-general, but how that application should be made, whether by suit or by petition, whether by a proceeding in an action originally instituted for other and additional purposes to those which can be accomplished under that statute, or by one began simply to enforce its provisions, is not declared. It is sufficient then, under that law, that the attorney-general should apply to the supreme court, and that that tribunal should obtain jurisdiction of the defendant by the service of proper process, or notice upon it. It was the duty of the court to hear the allegations and proofs of the parties, and from them decide whether the injunction and receiver asked for should be granted. It is true that the act seems to contemplate a report from the superintendent of insurance to the attorney-general, prior to the initiation of proceedings by the latter, but there is nothing to indicate that such was not made to the attorney-general in advance of any proceeding. There could, however, be no object in requiring such report, except to make necessary the concurrence of the superintendent of insurance in the relief

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sought, and as the court had before it such concurrence prior to the making of any order in the premises, the statute was substantially complied with. To hold otherwise would be an adherence to the letter and not to the spirit of the enactment. Whatever objections, however, could originally have been made, were not made, and they must now be deemed waived (see cases before cited to show that rights may be waived). There are cases which hold that no consent will give a court jurisdiction to try an action, which the statute forbids it to try (an attempt by a justice of the peace to try an issue involving title to lands, is an illustration of the rule), or to sit in judgment upon parties over whom it is declared it shall not so sit (a judge undertaking to act as such, when he is related to one of the parties within the ninth degree, is an example of that character), and there are others which hold that, on objection made, the court is powerless to grant relief, unless certain preliminary steps have been taken. To one or other of these classes of cases those cited by the defendant's counsel refer; but it has never been held, that when a court of general original jurisdiction can take cognizance of the subject-matter and of the parties to the action, and has brought such parties before it by the service of proper process, that the parties to be affected cannot waive any technical defects and preliminary proceedings which the law requires for their benefit. On the contrary, the books are full of cases holding that under such circumstances objections must be taken or they will be deemed waived. The supreme court did have jurisdiction of the subject-matter of the proceeding—the winding up of an alleged insolvent life insurance corporation—and the service of the summons and complaint upon it gave the tribunal power over its person. When the application was made for the receiver and injunction, if the report of the superintendent of insurance in advance of the application was a necessity, the law made it so for the benefit of the defendant, and it was necessary then to speak and claim the protection it gave. It was entirely competent for the defend-

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ant to waive it, and having so expressly done, it cannot now be heard to make the objection (see cases before cited). It will be unnecessary to refer to the order made at any length, but reference is made to the opinion in this action on the motion to confirm the actuary's report. It was fully justified by proof submitted to the court, and all its provisions consented to. These provisions plainly and clearly indicate, that whatever other or further proceedings might be taken in the action to annihilate the corporate life of the defendant, at least all parties contemplated, and the proofs fully justified, an injunction and a receiver under the act of 1869. As has been before said, that statute does not declare how the attorney-general shall apply to the court thereunder, whether by action, or by an original petition, or by an application in the progress of an action or proceeding which also seeks additional relief, as was done in this instance. It is enough that the application was made, that of it the defendant had due and proper notice that proof submitted justified the order made, and the defendant in addition consented. The order stands to-day unvacated and unappealed from, and by it all parties must be bound.

Since the order was entered, action has also been taken under it, such as the act of 1869 requires. An actuary has been appointed in pursuance of section 8 thereof, who, for months without objection, has been engaged in the performance of his duties, and has now made his formal report, as the law requires. To the original consent has been added long acquiescence, and it is now most clearly too late to object to its validity and attack it in a collateral manner (*Baird* agt. *Mayor, &c.*, 74 *N. Y.*, 382).

The motion made by the counsel for the defendant must, for the reasons stated, be overruled, and the one made in behalf of the people, the receiver and policyholders, for judgment will now be considered. The main propositions upon which such motion depends have already been discussed. The order entered has been held to be valid, and if valid is irrevocable

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by consent of the attorneys for the parties. When individuals have voluntarily placed their property in the hands of a receiver made by the court, by no consent of theirs can he be removed and the trust abrogated. The court has assumed a duty which is beyond their control (*Homes agt. McDowell*, 15 *Hun*, 185, which was affirmed in court of appeals "on prevailing opinion in court below," 76 *N. Y.*, 596). This doctrine is especially applicable to a proceeding against a life insurance corporation, because the course of procedure is all defined by statute (*Attorney-General agt. Atlantic Mutual Life Insurance Co.*, 55 *Howard*, 77, 82; *Same Case*, 56 *Howard*, 391; *Same Case at general term*, 15 *Hun*, 84, and *Same Case, in court of appeals*, 77 *N. Y.*, 336). No stipulation between the attorney-general and the defendant can undo or annul the order, and no issue to be made by a pleading, allowed by consent nearly a year after the order was made, can affect it. The rights of other parties have intervened, and such parties — policyholders — are now before the court, objecting to any investigation of the validity of the order appointing a receiver by the trial of an issue made without their consent, and without the consent of the court, by the attorneys for the original parties. It cannot be legal or proper to try an issue long since decided, even though the issues in the action had, by stipulation of the original parties thereto, been formed for any such purpose. If the original order was wrong, it should have been appealed from, or in some way discharged. Whilst it stands there can be no evidence received to invalidate it. So far, however, as this action seeks to dissolve the corporation, evidence must be given to justify it, but the order appointing the receiver is beyond review upon this trial. That officer must proceed as the order appointing him and the law direct, under the supervision and the control of the court.

The motion made by the counsel for the defendant is denied, but the court will hear such proof as either party may offer upon the allegations of the complaint on which the prayer to dissolve the corporation is based.

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N Y. SUPERIOR COURT.

EDWIN CLARK agt. PETER BOWE, sheriff, &c.

Complaint — Demurrer — which, in a complaint, is to control, a recital of facts which tends inevitably to raise one presumption both of fact and of law, or a general allegation which is in conflict with such recital?

In an action against a ministerial officer for executing a process valid upon its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void can have no greater force than a previous recital of the facts, which shows that it was authorized and valid, and a demurrer to such pleading in a complaint must be sustained.

Special Term, November, 1880.

DEMURRER to the complaint on the ground that it does not state facts sufficient to constitute cause of action.

Knox & McLean, for defendant.

Anthony R. Dyett, for plaintiff.

RUSSELL, J. — The complaint, after stating that the defendant is the sheriff, alleges :

“*Second.* That on or about the 18th day of May, 1880, in an action in the supreme court of the state of New York, in which Francis C. Clark was plaintiff and this plaintiff was defendant, a commitment was issued out of the said court and delivered to the defendant, as such sheriff, commanding him to arrest this plaintiff and to commit and confine him in close custody in the county jail of the county of New York, until he shall fully pay the sum of \$270, besides his fees, unless he should sooner be discharged by the court.”

Then follows an allegation of another similar commitment issued out of the same court on the twenty-second of May.

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"*Third.* That, as the plaintiff is informed and believes, both of said commitments were unauthorized by law and were void."

The second and third subdivisions of the complaint above recited were the ones attacked on the argument of this demurrer. The subsequent subdivisions of the complaint allege that the sheriff imprisoned the plaintiff in this action upon the commitment recited, against the plaintiff's protest and demand to be discharged, until the plaintiff was compelled to and did pay to the sheriff the sum of \$561, for which amount he asks judgment in this action. The criticism made upon the complaint is that the allegation that the commitments were void is not a statement of fact, but a conclusion of law; and that being a mere conclusion of law, taken in connection with a previous recital of the facts relating to the commitment, it is controlled by that recital of facts.

This criticism seems to me a just one. Sufficient facts are recited in the second subdivision, above quoted, to raise the presumption that the supreme court of the state of New York — a court of general jurisdiction, and therefore of presumed jurisdiction, unless facts are stated to upset that presumption — had actual jurisdiction of the parties, and of the action in the course of which it issued the commitments recited in this complaint. It does not appear by the complaint that the commitments were ever set aside or reversed, or that the discharge of the defendant named therein was ever ordered by the supreme court. Nor is any fact stated tending to show the commitments void. So, it appears by the complaint itself that a court of general and competent jurisdiction, in an action pending in it, made an order in the course of that action, which, so far as the allegations here are concerned, it is to be presumed it had the power and the right to make; and that the defendant, a ministerial officer, merely obeyed such a mandate of that court. As against this circumstantial recital of facts, which in any court must raise the presumptions I have suggested, the averment in the third subdivision of the complaint,

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that the commitments were unauthorized by law and void, ought to be regarded, if not a conclusion of law, a generality, controlled and overborne by the previous circumstantial recitals (*Roderiguez agt. East River Savings Bank*, 63 *N. Y.*, 460; *Lange agt. Benedict*, 73 *N. Y.*, pp. 12, 30).

I am cited by the plaintiff's counsel to a number of cases in which a general allegation of invalidity as "unlawful" in trespass (*Eddy agt. Beach*, 7 *Abb.*, 17; *Shaw agt. Jane*, 4 *How. P. R.*, 119), that matter is "material" in perjury, or that a conversion was "wrongful" in trover (56 *Barb.*, 395; 3 *Seldon*, 476; *Phinney agt. Phinney*, 17 *How. P. R.*, 197), were upheld as being a sufficient statement of fact. Those cases do not conflict with the opinion I have indicated. The difficulty with this complaint is that it recites facts which raise presumptions in conflict with and superior to the general allegation that the commitments were unauthorized by law and void. Suppose in an action of trespass the complaint should allege ownership of the property in defendant, and follow that with the general assertion that the trespass was "unlawful," which would control? or, in an indictment for perjury facts should be recited showing that the matter alleged was not material, would a mere allegation of materiality prevail on demurrer? or, in an action of trover, if sufficient facts should be recited to show that the conversion was rightful, would an allegation that it was "wrongful" overcome the recital of facts? The specific statement of facts would always prevail, in construing a complaint or any other paper, against a general statement, whether that statement should be regarded as a mere conclusion of law or not (*Hatch agt. Peet*, 23 *Barb.*, 575; *Hoge agt. Boyd*, 11 *How.*, 415; *Laub agt. Buckmiller*, 17 *N. Y.*, 620, 622; *Conaughty agt. Nichols*, 42 *N. Y.*, 83; *Gould agt. Glass*, 19 *Barb.*, 179; *Ogdensburg Bank agt. Van Rensselaer*, 6 *Hill*, 240; *Lange agt. Benedict*, *supra*; *Roderiguez agt. East River Bank*, *supra*).

In this case the question is not whether a ministerial officer is protected by process valid upon its face, but whether in an

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action against a ministerial officer for executing a process valid upon its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void shall have greater force than a recital of facts which shows that it was authorized and valid. It may not, in fact, have been authorized and valid, but it was, so far as the recitals in this complaint go. The commitment itself is not before us. If the second subdivision of the complaint were not somewhat circumstantial, at least sufficiently so to raise the presumption of jurisdiction and power, it might be that the general allegation of the third subdivision would be sufficient. But the second subdivision is sufficiently circumstantial to demand, before its force can be destroyed and the presumption which it raises of the validity of the process under which the defendant acted can be overthrown, a recital of facts which shall show that the supreme court either had not jurisdiction of the parties or of the action, or that it exceeded its jurisdiction, or that it issued an order which it was powerless to grant, or some other fact which would sufficiently inform this court that a co-ordinate court acted without authority of law.

I have not attempted to deal with the matter in controversy beyond the mere question of pleading, and, therefore, do not discuss those portions of the points of counsel relating to the liability of the sheriff to repay moneys to a party from whom they were taken by reason of a void process. It is certainly unnecessary to discuss those cases in which parties recovered from a tax collector moneys demanded by him upon void tax warrants, because in all of them it clearly appeared that the warrants were void, in none of them was the question in controversy one of pleading, and they all proceeded upon the theory that the plaintiffs never had their day in any court, and the presumptions, therefore, which attach to the process of the court, did not attach to a tax warrant. Here, I repeat, the only question is, which, in a complaint, is to control — a recital of facts which tends inevitably to raise one presumption both

The People *ex rel.* Hambrecht agt. Campbell.

of fact and of law, or a general allegation which is in conflict with such recital?

The demurrer is sustained, with leave to the plaintiff to amend his complaint upon payment of costs.

SUPREME COURT.

THE PEOPLE *ex rel.* ALBERT HAMBRECHT agt. TIMOTHY J. CAMPBELL, justice, &c.

Summary proceedings—Jurisdiction of district court justice to remove tenant where premises are not within his district.

A district court justice has no jurisdiction in summary proceedings to remove a tenant where the premises, which are the subject of controversy, are not within the district in which he was elected.

First Department, General Term, November, 1880.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

CERTIORARI to review summary proceedings.

Edward F. Hassey, for relator.

PER CURIAM. —The question presented in this case is whether the justice of one of the district courts of this city can entertain summary proceedings to remove a tenant under the provisions of the Revised Statutes where the premises, which are the subject of the controversy, are not situated within the district in which he was elected. It is supposed by the respondent that the act of 1879 (*chapter 101 of the Laws of that year*) enlarges the jurisdiction of the justices named, and authorizes them to entertain such an application if the premises be situated in any part of the city of New York. We think this view is erroneous. The amendment of section 28 of the Revised Statutes, accompanied by the act of 1879 (*supra*),

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was designed to and did enlarge the jurisdiction in such proceedings of the justices of the peace; and the amendment seems exclusively to relate to that subject. There are no words in the act repealing laws inconsistent therewith, and the legislature has not therefore, by anything in the amendment contained, authorized the conclusion that it was designed to repeal the act of 1877 restricting the jurisdiction of justices of the district courts to cases in which the premises were situated within their respective districts.

It becomes our duty, therefore, to declare that of the proceedings which this writ has brought up for review the justice had no jurisdiction.

The writ should be sustained and the proceedings reversed.

SUPREME COURT.

PETER A. H. JACKSON agt. FRANCIS E. REON, ADDISON J. TRINNIE, an infant, *et al.*

Mortgage foreclosure — When motion by plaintiffs for judgment upon an affidavit of regularity under Rule 63 will be denied infant defendant

Where, in a foreclosure suit, a motion was made by plaintiff for judgment based upon an affidavit of regularity under Rule 63, where all the parties were in default except an infant who had appeared and interposed an answer:

Held, that as the third defense contained in the answer of the infant by his guardian *ad litem* raises a material issue, namely, the amount unpaid on the mortgage held by the plaintiff, the motion being based solely upon Rule 63, must be denied.

Special Term, September, 1880.

THIS was a motion by plaintiff for judgment in a foreclosure suit based upon an affidavit of regularity under Rule 63, where all the parties were in default except an infant who had appeared by guardian and interposed an answer wherein,

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among other things, it was alleged as follows: "And said defendant, by his guardian, further shows and alleges on information and belief that the original mortgage mentioned in the complaint herein, and bearing date December 18, 1867, was thereafter reduced and partially paid off by the defendants Reon and Murphy; and at the time of the execution of the second mortgage mentioned in the complaint herein, and which is being foreclosed, and bearing date September 20, 1879, by the said defendants Reon and Murphy to this plaintiff, there was due and owing on said first mortgage the sum of only two thousand dollars, or thereabouts, and, therefore, denies the allegations in the complaint in relation thereto."

G. S. and I. H. Stitt, plaintiff's attorneys, for motion, cited *James* agt. *Morey* (2 *Cow.*, 246); *Ingraham* agt. *Baldwin* (9 *N. Y.*, 45); *Clift* agt. *White* (12 *N. Y.*, 519); *Mickles* agt. *Townsend* (18 *N. Y.*, 582); *Bascom* agt. *Smith* (34 *N. Y.*, 320).

Chas. G. Cronin, guardian *ad litem*, opposed. The answer raises a material issue, viz., the amount due thereon. All material issues must be tried by the court (*Exchange F. Ins. Co.* agt. *Earley*, 54 *How.*, 279; *Code*, sec. 965). There can be no valid decree against an infant by default, nor upon his guardian's answer (*Mills* agt. *Dennis*, 3 *Johns. Ch.*, 367). An infant's claim to property is entitled to especial protection (*Freeman* agt. *Muns*, 15 *Abb.*, 468). The consent by a guardian to a decree will not bind the infant (*Rogers* agt. *Cruger*, 7 *Johns.*, 557).

MACOMBER, J. — The third defense contained in the answer of Trinnie by his guardian *ad litem* raises a material issue, namely, the amount unpaid upon the mortgage held by the plaintiff. This motion, therefore, being based solely upon *Rule* 63, must be denied.

The motion is denied, with ten dollars costs.

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SUPREME COURT.

THEODORE V. MASTEN agt. JOHN OLCOTT and ADELAIDE
OLCOTT.

Estoppel — When judgment in justice court, in an action for trespass upon land, is a bar to an action in supreme court to recover possession of the same land.

The judgment or decree of a court possessing competent jurisdiction is not only final as to the subject-matter thereby determined, but also as to every other matter which the parties *might* litigate in the cause, and which they *might* have had decided.

Where, in an action in the supreme court to recover the possession of land, the facts which the plaintiff claims entitles him to recover are that, up to July 10, 1876, he, and those whose estate he has, had been in possession of the property under a claim of title for more than twenty years, and that on that day the defendant J. O. unlawfully entered under the defendant A. O. and wrongfully took possession. An action had previously been brought in a justices' court for a trespass upon this identical property (the defendant in that suit being the plaintiff in this action), and the issue which the plaintiff in that action, and one of the defendants in this action tendered in substance, was that on or about the 16th day of June, 1876, by virtue of an agreement with A. O., the plaintiff in that action, became possessed of the land described — which is described by metes and bounds — as a part of the saw-mill lot. He came into possession not as a trespasser but by virtue of an agreement with A. O. He took and became possessed of it as a part of the saw-mill lot. The defendant in opposition tendered the following issue: He denied each and every allegation, and claimed that he had been in possession of the property for the last twenty years:

Held, that the judgment which was recovered by one of the defendants in this action in justices' court against the present plaintiff for a trespass upon this identical property is a bar to this action.

Litigating the question of possession is not trying the title, but it is an issue which can be properly tried and determined in justices' court.

Sullivan County Circuit, October, 1880.

F. F. Bush, for plaintiff.

T. A. Niven and Thompson, for defendants.

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WESTBROOK, J. — This question has been suddenly sprung upon me during the trial, and my opportunity to examine it has, therefore, been limited, but I have thought of it carefully. I can say, further, that I have no reasonable doubt in regard to the correctness of my conclusion; if I had I would adopt the course which the counsel for the plaintiff has just suggested, making a *pro forma* ruling against the defendants. I may further say that I regret that I am compelled to dispose of the case upon this technical ground, for without it, so far as the evidence has disclosed the defense, I should be compelled to order a verdict in favor of the plaintiff. For this property, indisputably from all the evidence in the cause, was worked up to an old wall which has stood there for forty or fifty years; that wall has been a silent witness as to where the line between the saw-mill lot and the Wiltsie lot was for all that long period of time. Evidence of that character cannot be overturned upon light declarations and upon casual conversations testified to by interested parties. The evidence in the cause also is, that at a very early period there was a surrender of a part of the saw-mill lot for the purpose of straightening the line; and from that period of time, for more than forty years, there has been a cultivation and occupation of the Wiltsie lot up to that stone wall; and I am very much inclined to think that the parties to the partition suit and the purchaser at the partition sale so understood it when they made the conveyance to Helins only up to this old stone wall. It is, I know, unimportant for the purposes of the question before us, that I should have made those remarks, but those facts are in the case and I deem it but proper to state them.

The question now to be determined is this: Is the judgment which was recovered by one of the defendants in this action in justices' court, against the present plaintiff for a trespass upon this identical property, a bar to this action? In determining the question whether or not the former suit is a bar it is important to see what the plaintiff in this action claims are the facts which entitle him to recover. His claim

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is that, up to July 10, 1876, he, and those whose estate he has, had been in possession of the property under a claim of title for more than twenty years, and that on that day the defendant, John Olcott, unlawfully entered under the defendant Adelaide and wrongfully took possession. If he recovers he must recover upon that theory alone, and upon the truth of those allegations. The plaintiff has not shown a paper title to the property by virtue of which alone he could recover; for to recover on a paper title alone he must trace the title back to the State, the source of title. But he seeks to recover on his paper title, because he and those whose estate he has, as I have before remarked, have been in possession for twenty years prior to the entry upon the property by the defendants; that the plaintiff, and those whose estate he had, had thus been in possession was proper to be shown in justices' court, not for the purpose of establishing the legal title to the property to be in the defendant in the action in justices' court, but for the purpose of showing that the defendant in that action (who is the plaintiff in this) had the possession of the property and not the plaintiff in justices' court and the defendant in this action; and if that had been established in justices' court there could have been no recovery in that court by the plaintiff in that action.

Now, what did the judgment in justices' court establish? For the purpose of seeing what that judgment established, it may be well to look at the complaint as the issue which the plaintiff in that action, and one of the defendants in this action, tendered. In substance, he says that, on or about the 16th day of June, 1876, by virtue of an agreement with Adelaide Olcott, the plaintiff in that action, became possessed of the land described — which is described by metes and bounds — as a part of the saw-mill lot. He came into possession, not as a trespasser, but by virtue of an agreement with Adelaide Olcott; he took and became possessed of it as a part of the saw-mill lot.

What issue did the defendant tender in opposition to that?

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He denied each and every allegation, and claimed that he had been in possession of the property for the last twenty years. When, therefore, a judgment is rendered in favor of the plaintiff in that suit, and against the defendant in that suit (the defendant in that suit being the plaintiff in this action), what does that judgment necessarily establish? It not only establishes, as matter of fact, that the plaintiff in that action was in the possession of the property, and that the defendant in that action was not in possession of the property, as claimed by him upon that trial, and as now claimed, but it also judicially determines, as matter of law, a further fact, and that is, that the entry of the plaintiff in that action upon that property was not wrongful and tortious, as now claimed, but proper and legal as then and there claimed by the plaintiff in that suit; and that the defendant's (the plaintiff in this action) entry upon that property was a tortious and wrongful entry. Until that judgment establishing those facts is reversed, it is forever conclusive between the parties on those issues. Neither party is at liberty to dispute or deny them. No other court, nor any other jury can ever find them in another action to be otherwise than as therein and thereby established, and if the plaintiff in this action should recover, he can only recover by establishing the contrary of those facts, and I repeat all those facts were facts proper to be tried in justices' court; facts of which the justice had perfect, full and complete jurisdiction to try and decide, for it has been held that litigating the question of possession is not trying the title, but it is an issue which can be properly tried and determined in justices' court. So that we find that in the justices' court it has been adjudged that the fact which the plaintiff now alleges, that he, and those whose estate he has, had been in possession of that property for twenty years prior to the entry by defendant, is not true, and it being found and established not to be true, by no evidence can it be established to the reverse in the present action.

I have thus far looked at this question of estoppel, based

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upon the theory of the defendant that a judgment of a court is only conclusive upon those facts which could be tried in the court where they were tried, and I have shown that those facts upon which the plaintiff relies, and which are essential to his recovery, could have been tried in justices' court, and were in fact then tried and determined against him. But there is another view of the case which seems to me to be equally clear, and that is this: Conceding that the justice had not the power to try the entire issue of the parties; conceding that he had no power to try the actual title to the land, does that make any difference in fact with the effect of the claimed estoppel? If in that suit, and if in that action, the question of title was not tried, whose fault was it? It could have been tried in that action, though not before the magistrate before whom suit was instituted. The statutes of the state gave to the defendant the right to present his entire defense. He was not compelled, because he was sued in a justices' court, to present only half of his defense. By choosing that tribunal the plaintiff could not debar the defendant of all the defense which he had to the action. He was at liberty still to make in *that* action his whole defense, and show in *that* suit that he had title in fact to the property. I emphasize the words "*in that suit*" because it has been adjudged and decided that if the defendant in an action tenders the plea of title, and gives a bond, that the suit which is commenced in another court to recover for the same cause of action is a continuation of the suit in justices' court. Now the defendant in that action was not, as I have before said, bound to make only a partial defense. He could have made his whole defense. He could, in addition to the defense which he made, have also interposed the plea of title and said: "I am the owner of this property; it was my property, and though the defendants came into the possession of the property upon the 10th of June, 1876, their act was a trespass upon my rights as owner." He could have given a bond and taken the suit to another court.

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It is said, by the counsel for the plaintiff, that this might oftentimes work injustice; that a party might sometimes be unable to give a bond; he might be poor. He asks, and there seems to be some plausibility in the question: Ought a man to lose his property because he is poor? Well, unfortunately, oftentimes that question must be answered in the affirmative. There is many a man who has lost his rights because he was too poor to defend them. There is many a man who has lost his suit because he was unable to procure the witness who could have established his defense. It is oftentimes that the rules of justice work with harshness in particular cases, and we can only defend the rules by saying that the law must be general in its operation and in its effects, and the good which is done thereby is greater than the evil which may sometimes result in particular cases. If the defendant could have made that defense in justice court, by interposing a plea of title, and taking it from before the justice, was he not bound to do so?

I believe it is a rule of law, perfectly well settled — settled from time immemorial — that when a party is sued he must make whatever defense to that cause of action that he can make; and a failure to make every defense which he can make is a waiver of every one which he does not make; and if the plaintiff in this action undertook that trial with only a partial defense, when he could have made a complete defense, and thereby enabled the justice to decide that his acts were trespasses, and the acts of these defendants were not, he must forever be estopped and precluded, because, by the finding, and by the judgment in this case, if the plaintiff recovers, then it is judicially determined and declared that the acts of the plaintiff in this action were legal and right, and that the acts of the defendant in this action were trespasses, being the exact opposite of what was determined in justice court.

It is hardly worth while to cite authorities to establish the doctrine, that whatever defense a man can make to the cause of action he must make, because the rule is thoroughly and

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firmly established. It was so held in the case of *Seguin* agt. *Gouverneur & Kemble* (1 *Johnson's Cases*, 436), where it says: "The judgment or decree of a court possessing competent jurisdiction is not only final as to the subject-matter thereby determined, but also as to every other matter which the parties *might* litigate." Where, may I ask? Not in the tribunal before which a cause is brought, but which they "might litigate in the cause, and which they *might* have had decided."

Now, if the case, upon being discontinued from justices' court by the giving of the bond, and begun in another court, is "*the cause*," and if the defendant by giving a bond might have litigated that question in "*the cause*," it follows that this rule as here laid down is directly applicable.

Again, this same doctrine is laid down in the note on page 492, 1 *Johnson's Cases* (*Shepard's edition*). Speaking of this principle it says: "The general principle here stated has become firmly fixed in the jurisprudence of the country," citing a large number of cases and citing the old maxim, "*Interest reipublicae ut sit finis litium*." That is, it is the interest of the state or republic that there should be an end to litigation. "Thus a judgment rendered on a promissory note is a good bar to an action on such note, though blank spaces are left in such judgment for the amount of damages and costs; and a judgment in favor of the plaintiff, in an action of trespass to try title, is conclusive between the parties as to all titles which the defendant had at the time of the trial."

This same doctrine is followed in 49 *New York*, in the case of *Malloney* agt. *Horan*, in the opinion of judge FOLGER, at page 116, where he says: "It is claimed that the rule goes further, and that the judgment is final and conclusive upon the parties to it upon all matters which might be litigated and determined therein," citing *Le Guen* agt. *Gouverneur* (1 *Johnson's Cases*, 436, and note to *Shepard's edition*). There the judge proceeds to show why that rule was not applicable to the case before him, and then adds that this defense of the

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party in this case "would not have been matter in direct opposition to the action in defense of the claim made by the plaintiff therein. It would have been a *quasi* admission of the cause of action set up, and a seeking for relief in the judgment which must follow; and when the authorities say that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, the expression must be limited as applicable to such matters only as might have been used as a defense in that action against an adverse claim therein. Such matters, as if now considered, would involve an inquiry into the merits of the former judgment."

I then understand this case as affirming the doctrine in the first of *Johnson's Cases*, to the effect that all matters which make a direct and straight defense to the cause of action of the plaintiff must be tried in that action, if they can be tried therein, and I have shown that the alleged title of ownership of this plaintiff could have been tried in that action commenced before the justice, if the plaintiff had taken the proper steps so to do. Without, however, reasoning this case out upon principle any further, let me now refer to the cause of *Boyer agt. Schofield* (in 1st of *Abbott's Court of Appeals Decisions*, and also reported in 2 *Keyes*, 628), for I regard that case as directly in point on the very question before us, and as clearly decisive of it. One Schofield, by the construction of a dam, had diverted the water of a stream and caused it to overflow the land of Boyer. Boyer entered upon Schofield's land and tore down the dam, and for that act Schofield sued him in justices' court. Boyer succeeded in his defense, and having been successful in that suit, he then brought an action against Schofield for the injury done to him by the nuisance which he (Boyer) had abated, and upon the trial of the action, brought by Boyer against Schofield, it was held that the former judgment in his favor in justices' court was a complete settlement of the rights of the parties, and that they could not again be re-investigated. And I think a study

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of this case will show that the court put themselves substantially upon the same ground upon which I rest my decision ; in this I refer especially to the concluding portion of the opinion of DAVIES, chief justice. He says : " These observations are applicable, with force, to the case at bar, and effectually dispose of the defendant's objection that the judgment in the justices' court, between the parties, was not a bar, on the ground that the justice had not jurisdiction of the action in which it was rendered ; " and I may say, in passing, the right to overflow another man's land by a stream of water, or the right to divert water from another's land, does involve an inquiry into title and rights of ownership of real estate. Judge DAVIES continues : " As already observed, that objection cannot now be taken, for the period has elapsed for setting up that the title to real property was involved therein. If this question appeared by the pleadings, it was to be interposed at the time of joining issue, and, in addition, security was to be given if it appeared on the trial and was not disputed ; then, in either contingency "—either because not pleaded at the proper time, or because a motion was not made to dismiss for want of jurisdiction—" the parties are now precluded from setting it up."

It seems to me, therefore, upon every view of this case, and for the reasons which I have stated, a verdict in this case must be directed in favor of the defendants. I repeat, that I regret this because I think, independent of this question of estoppel by the judgment in justices' court, that the plaintiff has established a clear title to the property ; and let me say now what, perhaps, it may be well to speak in this room, that the law has respect to what the parties have done in regard to boundaries. After long years have elapsed it is always impossible to ascertain with precision where lines were once located. The surveys may not have then been as accurate as now, and parties may have been less careful about a few feet of land then than now ; and what they did years and years ago by way of proclaiming where the line between parties is, which has been acquiesced in and lived up to for a long series of years, is

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higher and better evidence of what the true location of the line is than any modern and recent surveys; and if parties will remember that what they have practically lived up to as the line for over twenty years becomes in law the line, it will save much litigation and much feeling.

For the purpose of enabling the plaintiff to review my decision, if wrong, I will suspend the entry of judgment, and order the case to be heard in the first instance at the general term, and give to the plaintiff such further time as he may desire.

Judge BUSH — With all due respect to your honor's decision, I desire to ask, for the purpose of raising questions, as follows: To direct a verdict for the plaintiff in this action. (Denied. Plaintiff excepts.)

Judge BUSH — I except to the ruling that the plaintiff has not proven a paper title, but that he relies upon possessions under his deed in this action.

The COURT — That hardly expresses my thought; that was only a reason which I gave for granting this motion, which has been made for judgment on account of the estoppel. I did not say that you did not rely upon paper title, or had not proved paper title, but I say you have not established such a paper title in this case as would, without the evidence of possession accompanying it, give you a right to the premises; that is what I said.

Mr. BUSH — To that I take an exception, and also to your ruling that the question in this case (as I understand it) turns upon possession of the plaintiff for more than twenty years under his deed, and that that matter of fact is determined by the judgment in the justices' court; also that the justice's judgment is conclusive upon the question of title in this case; also that the judgment judicially determines the issue of possession for fifteen years; also that the judgment judicially determines that the defendant in this action was lawfully in possession of the land at the time of the trespass, and that the defendant entered the land without right; also that the

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defendant was bound to plead title in the justices' court and give the bond required by the Code; and that a neglect to do so estopped him from claiming that in this action.

The COURT — All those matters you specially except to are simply my reasons which I give for the general result which I am about to order, viz., a verdict in favor of the defendant. I think it is better and safer for you to except to the general direction instead of the particular reasoning upon which I sustain it.

Judge BUSH — I except to your honor's ordering a verdict for defendant, and ask that a stay of proceedings be granted until the case can be heard at the general term and sixty days in which to make a bill of exceptions.

The COURT — Certainly.

Judge BUSH — The only question that I wish to consider at the general term is the effect of the justice's judgment; and I desire, instead of making a case and lumbering the record up with all these documents and deeds, that we simply make a bill of exceptions containing so much of the proceedings as is necessary to show that question. In that view I purpose simply to make a bill of exceptions.

The COURT — Yes; I ought to have made, and I will make, this general remark about the effect of that partition case. I think the partition case is clearly no estoppel. Let me state my reasons why it is not an estoppel in my judgment. The description, it is true, in the partition case is a description taken from the old deeds, and, perhaps, by running the course and distance in the deed it might include the *locus in quo*; but course and distance in a deed must yield to monuments, and the long occupation of the parties proven in the case up to that stone wall, in my judgment, conclusively establishes the line between the saw-mill lot and the Wiltsie lot; establishes it as evidence not only as a mere matter of estoppel, but the fact of that long occupation is conclusive proof as to where that line originally was, and, therefore, that the judgment in the partition case can be no estoppel.

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MR. THOMPSON — To that we except; we wish that question to go to the general term.

Judge BUSH — We wish it understood that those questions cannot be passed upon by the general term, because the case does not turn upon any of these questions.

The COURT — We will take care of that bye-and-bye. "Sufficient unto the day is the evil thereof."

COURT OF APPEALS.

DAVID SOLINGER, plaintiff and appellant, agt. EDWARD EARLE, defendant and respondent.

Composition agreement—Effect of a secret agreement to pay one of the creditors more than his pro rata share— Note given under such secret agreement cannot be enforced.

If a composition agreement provides for a *pro rata* payment to all the creditors of a debtor, a secret agreement to pay one of the creditors more than his *pro rata* share to induce him to unite in the composition is a fraud upon the other creditors. It violates the principles of equity and the mutual confidence between creditors. A note or other security given under such a secret agreement cannot be enforced.

But if a negotiable note be given by a friend of the insolvent, not related to him by blood, the friend is a mere volunteer; and if the friend's note be transferred by the payee to an innocent holder, to whom the friend is obliged to pay it, he cannot, under such circumstances, recover back the money paid.

Decided November, 1880.

APPEAL from a judgment rendered by the general term of the New York superior court.

Abraham Kling, for plaintiff and appellant.

Wm. M. Ivens, for defendant and respondent.

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ANDREWS, J. — The plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give his negotiable note for a portion of this debt beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a *bona fide* holder, and the plaintiff having been compelled to pay it brings this action to recover the money paid.

The complaint alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection and was solicitous to aid him in effecting the compromise; and that the defendants knowing the facts and taking an unfair advantage of their position extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion, payable under the composition, was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character. A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity and the

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mutual confidence as between creditors upon which the agreement is based, and diminishes the motive of the creditor, who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemns such a transaction. If the defendants here were plaintiffs seeking to enforce the note it is clear that they could not recover (*Cockshott agt. Bennett*, 2 Term R., 763; *Licester agt. Rose*, 4 East., 372). The illegality of the consideration upon well settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud and an active participator in it, would, nevertheless, be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts on the application of a party to the illegality. But if he had voluntarily paid the note he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note would, in case the note had been paid, protect the defendants in resisting an action to recover back the money paid upon it (*Nellis agt. Clark*, 4 Hill, 429).

It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement, exacted by a creditor in fraud of the composition, and the cases of *Smith agt. Bromley* (2 Doug., 696), *Smith agt. Cuff* (6 M. & S., 160) and *Atkinson agt. Denby* (7 H. & N., 934) are relied upon to sustain this claim. In *Smith agt. Bromley* the defendant, being the chief creditor of a bankrupt, took out a commission against him, but afterwards finding no dividend likely to be made refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord MANSFIELD,

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in his judgment, referred to the statute (5 *Geo.*, 11, *chap.* 30, *sec.* 11) which avoids all contracts made to induce a creditor to sign the certificate of the bankrupt, and said, "the present case is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff in the case of a person pressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother; and, again, if any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassing of his family."

In *Howson agt. Hancock* (8 *Term R.*, 575) lord KENYON said that *Smith agt. Bromley* was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in *pari delicto*, and this remark is fully sustained by reference to lord MANSFIELD's judgment. *Smith agt. Cuff* was an action brought to recover money paid by the plaintiff to take up his note given to the defendant for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing with the other creditors a composition. The defendant negotiated the note and the plaintiff was compelled to pay it. The plaintiff recovered. Lord ELLENBOROUGH said: "This is not a case of *par delictum*, it is oppression on the one side and submission on the other, it never can be predicted as *par delictum* where one holds the rod and the other bows to it."

Atkinson agt. Denby was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of *Smith agt. Bromley* and *Smith agt. Duff*. It is somewhat difficult to understand how a debtor, who simply pays his debt in full, can be considered the victim of oppression or extortion, because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in *pari delicto* (See remark of PARK, B., in *Higgins agt. Pitt*, 4 *Exch.*, 312). But the cases referred to go no further than to hold that the debtor himself, or a near relative who, out of compassion for

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him, pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress, and as not equally criminal with the creditor. These decisions cannot be upheld on the ground simply that such payment was against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrong-doer to recover back money paid to another in pursuance of an agreement between them, void as against public policy.

It was conceded by lord MANSFIELD in *Smith agt. Bromley*, that when both parties are equally criminal against the general laws of public policy, the rule is *portior est conditio defendentis*, and lord KENYON in *Hobson agt. Hancock*, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back.

It is laid down in *Cro. Jac.* (187) that "a man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only." And in *Robinson agt. Gould* (11 *Cush.*, 57) the rule was applied, where a surety sought to plead his own coercion as growing out of the fact that his principal was suffering illegal imprisonment, as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in *Cro. Jac.* has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent (*Wayne agt. Sands*, 1 *Freeman*, 351; *Bayley agt. Clare*, 2 *Browne*, 276; 1 *Rob. Abr.*, 687; *Jacob's Law Dict.*, "Duress").

We see no ground upon which it can be held that the plaintiff in this case was not in *par delictum* in the transaction with the defendants. So far as the complaint shows, he was a volunteer in entering into the fraudulent agreement. It is

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not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which *Smith agt. Bromley* was decided, we are of opinion that the doctrine in that, and the subsequent cases referred to, can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage with a debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress, by reason simply of that relationship or of the interest which he might naturally take in his relative's affairs.

The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of the negotiability show.

It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancellation (*Jackson agt. Mitchell*, 13 *Ves.*, 581). But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur.

NOTE.—The court below distinguished this case from *Gilmour agt. Thompson* (49 *How. Pr.*, 198), as follows: "In *Gilmour agt. Thompson* the plaintiff had a right of action, although the transaction was illegal, because he was the debtor, and so, in the estimate of law, the victim of oppression. In the present case the plaintiff was a party to the illegal transaction, but not a victim. His participation in it was voluntary, &c." (See report of case in 45 *N. Y. Superior Court Reps.*, 604). The court of appeals seem to have decided the appeal upon this principle.—[REP.]

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N. Y. COMMON PLEAS.

HENRY VAN SCHAICK agt. FRANZ SIGEL.

Liability of register of New York for neglect or error in making and returning an official search.

The register of the city of New York is liable for all errors, inaccuracies or mistakes made in a return, when the usual requisition has been made at his office for a certificate of search.

And this, although the party in making his requisition at the register's office, designated the clerk whom he desired should make the search (*Affirming S. C.*, 58 *How.*, 211).

It is the duty of the register to make the search correct, and any failure in that respect is a neglect of duty.

Where a plaintiff has been damnified by a wrong-doer, he must see to it that his loss is not swollen by any act of omission, or of commission on his part, but he is not called upon to do an act which will not affect his own damages, though it would be of service to the wrong-doer.

General Term, November, 1880.

Before DALY, Ch. J., J. F. DALY and VAN HOESEN, JJ.

VAN HOESEN, J. — ⁽¹¹⁶⁾The search, which proved to be erroneous, was made by De Grove, an employe of the defendant, and its correctness was certified to by Lennox, the assistant deputy register. No question as to the liability of the defendant for the damages caused by the mistake exists, and the principal point noted is, do these facts make the defendant guilty of misconduct or neglect in office? The question is important because the defendant's liabilities to arrest in this action depends upon the answer. The language of the statute seems to me to leave no doubt upon the point. It declares that "it shall be the duty of the register to cause every written order or written requisition for search to be made without delay, and to be certified and ready for delivery within twenty days from the receipt of such written order or requisition by him; and he shall be liable for all damages and injuries

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resulting from errors, inaccuracies or mistakes in his return so certified by him." It is also provided that his deputy and his assistant deputy shall have the same powers as a deputy county clerk. It is obvious that it is the duty of the register to cause the search to be made and certified. The search must be correct, for there is a penalty imposed for any mistake or error. If it be the duty to make the search correct, any failure in that respect is a neglect of duty.

The act provides that the requisite machinery shall be placed in the register's hands, for he is empowered to appoint searchers. He need not personally search or personally certify, for he may *cause* the work to be done; but his is the liability if there be inaccuracy, error or mistake. He has the unrestricted choice of his subordinates, and, like a sheriff, he should answer for the doings of his assistants in the line of their duty. The principal which would excuse the defendant from arrest would extend to the case of every officer whose duties are partially performed by a deputy, or by clerks, for though the certificate should be given by his own hand, the officer could truly say, in most cases, that he relied upon some assistant for information as to the matters to which he certified, and that personally he knew nothing of the error for which the injured party sought to hold him answerable. It must be held to be the duty of the register to know what he certifies to be true, and to be a neglect of duty to certify to an error (*Pickard* agt. *Smith*, 10 C. B. [N. S.], 470). A suggestion to the register that the plaintiff would be glad to have the requisition given to De Grove (for the special memorandum amounted to nothing more than that), does not relieve the defendant from liability. De Grove was a searcher appointed by the defendant, and steadily engaged in the office, and in that most essential respect this case differs from that of *De Moranda* agt. *Dunkin* (4 Term R., 119), where the sheriff was held not to be responsible for the act of a special bailiff appointed at the instance of the plaintiff.

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It is said that when the plaintiff became aware that the search was incorrect, he was bound to communicate that fact to the defendant, that the latter might have bought up the Coffin mortgage before the costs of foreclosure had been added to it. It is undoubtedly true that the plaintiff was under obligation to make reasonable exertions to prevent the increase of the damages likely to fall upon himself, and thus incidentally to protect the defendant, but it was not his duty to go one step farther. He was not bound to know that the defendant could or would buy, or settle the Coffin mortgage, and he is not to suffer because he did not think of that plan. Where a plaintiff has been damnified by a wrong-doer, he must see to it that his loss is not swollen by any act of omission, or of commission on his part, but he is not called upon to do an act which will not affect his own damages, though it would be of service to the wrong-doer.

The opinion of judge LAREMORE states the facts and the law so clearly, that I think it unnecessary to say more.

The judgment should be affirmed, with costs.

DALY Ch. J. and J. F. DALY, J.

SUPREME COURT.

GERMAN BANK OF LONDON, LIMITED, agt. BOWIE DASH and another.

Attachment — Facts which are not sufficient to justify a resort to the remedy — Disposal of the property of the plaintiff alone not sufficient — Code of Civil Procedure, section 636.

The defendants had in store for plaintiff a quantity of coffee, to be held for it, with liberty to sell, and to pay the plaintiff, out of the proceeds, the amount due upon bills of exchange which it had discounted on the security of the property. The defendants sold the coffee, using the proceeds, which were more than sufficient to pay the drafts, in their business.

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Held, upon a motion to vacate an attachment granted upon these facts, that the modified wording of section 636 of the Code of Civil Procedure has not changed the provision of section 227 of the former Code in this respect, and that the attachment cannot be sustained, because it has not been shown that the debtors either assigned, disposed of, or secreted, or were about to assign, dispose of, or secrete their property, with the intent to defraud their creditors.

Held, that the provision as to attachments differs in this respect from that providing for the making of an order of arrest; so that a debtor is liable to arrest, but not to seizure of his property by attachment, when he may have disposed of plaintiff's property or that of any other person with intent to defraud its owner.

Special Term, December, 1880.

MOTION to set aside an attachment.

Aaron Pennington Whitehead, for defendants.

Wheeler H. Peckham, for plaintiff.

DANIELS, J. — The affidavit made on behalf of the plaintiff and the receipts annexed to it establish the facts that the defendants had in store for the plaintiff 4,870 bags of coffee, to be held for it, but with liberty to sell it and to pay the plaintiff out of the proceeds the amount due to it upon bills of exchange which it had discounted on the security of the property. The affidavit shows that the defendants afterwards sold the coffee and made use of the proceeds, which were more than sufficient to pay the drafts, in their business, and in that manner appropriated them to their own use. Upon these facts the attachment against the defendants' property was issued, and they now insist that they were not sufficient to justify a resort to that remedy. It has not been shown that the defendants had disposed of, or were about to assign, dispose of, or secrete any of their own property with intent to defraud their creditors, but it has been claimed that they became liable to an attachment of their property because they had fraudulently disposed of the plaintiff's property.

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As the statute defining the facts upon which an attachment might be issued before the enactment of the present Code, provided it could be done where the defendants were residents of the state, as these defendants are, for a fraudulent disposition of property, only when the property was that of the defendant (*Code of Procedure, sec. 227*), it was indispensable that it should be shown that the defendant either had or was about to dispose of his—or in case it was a corporation, of its—property with the intent to defraud creditors.

In the revision which has been made by the present Code upon this subject the terms “his” or “its” have been omitted (*Code Civil Procedure, sec. 636, sub. 2*), and on that account it is urged that a debtor is liable to the seizure of his property by attachment when he may have disposed of the plaintiff's property, or that of any other person, with intent to defraud its owner. In this respect the provision differs from a similar one made for the purpose of providing for the making of an order of arrest. There the language made use of is the same as it was in the preceding Code, making it still necessary that the debtor shall be shown either to have disposed, or that he is about to dispose of or remove his property with intent to defraud his creditors (*Code Civil Procedure, sec. 550, sub. 2*). Both these remedies, in their nature, should depend very much upon the same state of facts, and there seems to be no reasonable propriety in requiring in the one case that the right shall be restricted to the disposition by the debtor of his own property with a fraudulent intent, while in the other the disposition of the property of any other person would also entitle the creditor to the remedial benefit of the statute. That was not, probably, what the legislature intended to do by means of these subdivisions. There would be no propriety in making one remedy dependent solely upon the disposition of the debtor's property, while the right to the other might be created by the disposition of the property of a stranger. The subdivision itself is not consistent with such construction

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of its terms, for it is still necessary that the debtor shall be shown to have assigned, disposed of or secreted, or to be about to assign, dispose of, or secrete property with the intent to defraud his or its creditors, and they could not be defrauded by such a disposition of the property of a person who was in no sense a creditor. If the construction contended for on behalf of the plaintiff should be allowed to prevail, then any person who should intentionally convert the property of another would not only subject himself to an attachment at the suit of the owner, but at the suit also of every creditor he might have, which would be a result that it would be unreasonable to believe the legislature intended to provide for by this section of the Code. When the preceding section is considered with this one, it is further evident that it was not intended to subject him to the seizure of his other property by means of an attachment simply because of the existence of the fact that he had converted the property of the plaintiff; for by defining the cases in which an attachment may issue it has been required that only the cause of action itself shall be shown, but, beyond that, the additional fact necessary to bring the case within the provisions of section 636 must also be maintained. The conversion of the owner's property alone is not sufficient for that purpose. That merely establishes a cause of action, and to render the debtor liable to an attachment it must appear further that one of the facts exist which, according to the succeeding section, will entitle the plaintiff to that remedy. In other words, where the action is, as it may be, for the wrongful conversion of the plaintiff's property, it must be shown also that the defendant is either not a resident of the state or that he has departed from it to defraud his creditors, or to avoid the service of a summons, or conceals himself within it with that intent, or that he has removed, or is about to remove, property from the state, or has assigned, disposed of or secreted, or is about to assign, dispose, of or secrete property with the intent to defraud his creditors. His liability for the conversion of the property is not suffi-

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cient to conform to these requirements, but the case must go further and establish the additional circumstance, where the application is of the nature of that made in this suit, that he has done some act intending, by means of it, to defraud his creditors, not merely for the purpose of depriving the plaintiff of his own property, but that the intent, with which he has been actuated is to hinder, delay or defraud such persons as may properly be designated as his creditors.

In this case the plaintiff may maintain an action to recover the money which the defendants wrongfully appropriated to their own use, and in that form it would sustain the relation of a creditor to them as its debtors, but that of itself would fail to establish the additional circumstance which was intended to be required, that the debtors had, or were about to dispose of, assign or remove, or secrete their property to defraud their creditors. There was no necessity for such a change in the provisions of the law delaring the cases in which attachment might be issued, justifying the change of the nature of that contended for in this instance. As it stood before the enactment of the present Code it seemed to be ample, in the way of affording a remedy, to redress the rights of creditors whenever they might properly require the interposition of the courts. No such change was suggested in any quarter as that which would render the debtors property liable to an attachment in case he had only converted or wrongfully appropriated that of some other person; and the note of the commissioners to the article containing this section, and also to the section itself, in which they explain the reasons for the additions made by them, indicate no intention whatever of so enlarging the power to issue an attachment as to make it applicable to a case of that nature. To do so would subject debtors to risks and hardships entirely disproportionate to the act forming the subject of complaint. If the terms of the subdivision, as they are insisted upon, were followed, a debtor who should fraudulently appropriate to his own use the most insignificant article of another's property, would be liable to an

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immediate seizure of his own at the suit of every creditor having a demand against him ; which is a consequence that the legislature could not have intended to sanction by the enactment of these provisions. It is more consonant with the probability of the case, as no reason appeared to exist requiring a change in the law, that the words which restricted the authority to issue an attachment as they existed in the preceding law were inadvertently omitted from this section. The prevailing rule of construction where a statute has been revised, although its terms may to some extent have been changed, requires that it should still be attended with the same effect where no reason or intention seems to exist for enlarging or restraining it.

Upon this subject it has been held that where a law antecedently to a revision of the statutes is settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology will not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change (*case of Yates*, 4 *Johns.*, 318, 359 ; *Douglass* agt. *Howland*, 24 *Wend.*, 35, 47 ; *Matter of Hart*, 2 *Hill*, 380 ; *Parmelee* agt. *Thompson*, 7 *Hill*, 77). What the legislature seemed to have intended was to re-enact the previously existing provisions defining the cases in which the property of a debtor might be seized by means of an attachment and not to enlarge the scope of that remedy to such bounds as to render it an engine of oppression and injustice, and the language made use of should be so construed as to maintain and promote that object.

The attachment issued in this case cannot be sustained, for the reasons already indicated : That it has not been shown that the debtors either assigned, disposed of, or secreted, or were about to assign, dispose of, or secrete their property with the intent to defraud their creditors.

It was as incumbent upon the plaintiff to establish the existence of that fact before it could be entitled to an attachment, as it was to show that it had a cause of action in its own

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favor against the defendant for the conversion or misappropriation of its property.

Nothing less than that in a case of this nature can warrant the issuing of an attachment. In that respect the proofs produced were fatally defective.

The other case of the English Bank of Rio De Janeiro, limited, against the same defendants, depends upon the same facts, and must be disposed of in the same way.

In both cases the attachments issued must be set aside, but without costs.

SUPREME COURT.

THE PEOPLE, &c., *ex rel.* ISAAC EVANS agt. THE BOARD OF COMMISSIONERS OF THE DEPARTMENT OF PUBLIC PARKS.

THE SAME *ex rel.* GEORGE H. HARRISON agt. THE SAME.

THE SAME *ex rel.* JOSEPH F. BELTON agt. THE SAME.

THE SAME *ex rel.* WILLIAM E. BEAMES agt. THE SAME.

Certiorari—Removal of clerks from the public service—When notice of the cause, and an opportunity to explain, is not necessary.

The return of the respondents, the commissioners of public parks, to the writs of *certiorari*, shows that they discharged the relators, who were clerks in the department of parks, from the public service, because the appropriation for the maintenance of the park department, for the year in which the relators were severally discharged, had been reduced by the board of apportionment below the appropriation for the previous year, which necessitated the reduction of expenses and the removal:

Held, that the terms of chapter 335, section 28, of the laws of 1873, which prohibits the removal of a clerk until he has been informed of the cause of his proposed removal, and an opportunity has been offered him for making an explanation does not apply. That notice and an opportunity to explain applies to cases where the removal is proposed to be made for

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cause *personal to the party*, or when it is sought arbitrarily and without adequate reason, to substitute another person in the place of one proposed to be removed.

Special Term, August, 1880.

CERTIORARI to the commissioners of public parks.

Nelson J. Waterbury, for relators.

William C. Whitney, counsel to the corporation, opposed.

VAN VORST, J.—The relators have instituted these proceedings by *certiorari* to review the action of the respondent in removing them from clerkships in the department of public parks. It is claimed on the behalf of the relators severally, that no notice of their proposed removal was given to them, and no opportunity for a hearing or for explanation was afforded them, and that the grounds assigned by the returns to the *certiorari's* were not the true grounds for their removal. This action on the part of the respondent is claimed by the relators to have been a violation of the Laws of 1873 (*page 491, chapter 335, section 28*), and they seek to be restored to their places. The returns to the *certiorari's* disclose, as the reason for discharging the relators from the public service, that the appropriation for the maintenance of the park department for the year 1876, being the year in which the relators were severally discharged, was reduced by the Board of Apportionment below the appropriation for the prior year, and that the Park Commissioners, after prolonged discussions and reports upon the method of reducing the expenses, so as to bring them within the appropriation, and in furtherance of the duty imposed upon them by law, discharged the relators from employment because their services were no longer needed, and the duties theretofore performed by them were distributed amongst and added to the services to be performed by other employes in the public service.

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If the reasons assigned by the respondent were true, and upon this hearing they must be assumed to be so, I cannot perceive that the action of the respondent was illegal, or that it can be interfered with by this court.

The provisions of law, which it is claimed by the relators were violated, is in these words: "No regular clerk, or head of a bureau, shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation, and in every case of a removal the true ground thereof shall be forthwith entered upon the records of the department or board."

The design of the statute was to impose a limitation upon the department from causeless and unjust removals of persons appointed to the public service, and to hold them to accountability for removals, for which a valid reason in the law could not be assigned.

The limitation contained in the statute is in the interest of the public, which is best promoted by keeping in the service honest clerks who have attained experience in their employment, and besides it is a matter of justice to the employee himself, whose summary displacement, and the appointment of another in his place, may give rise to an implication of infidelity, or unskillfulness on his part, which an examination and explanation might have wholly dispelled.

But no such reasons exist when a clerk is discharged from the public service because the moneys appropriated by the body charged with that subject are insufficient to keep up the clerical force to the standard which had obtained when larger appropriations were made, or when for such cause his services are no longer needed.

The notice is indispensable, and an opportunity should be afforded to the clerk to make an explanation, when such explanation might prevent the proposed removal.

It is quite evident that the section applies only to cases where the removal is proposed to be made without just cause personal to the party, or when it is sought arbitrarily, and

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without adequate reason, to substitute another person in the place of one proposed to be removed.

In the case of *The People on the Relation of Mundy agt. The Fire Commissioners* (72 N. Y., 445-449), ALLEN, J., clearly suggests such a view of this section. He says: "The party against whom the proceeding is taken must be informed of the cause of the proposed removal, and be allowed an opportunity of explanation. This necessarily implies that the cause is to be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place."

This is reiterated by the same judge in *The People ex rel. Sims agt. The Fire Department* (73 N. Y., 437).

The department was under an imperative duty to adjust their expenditures to the amount of the appropriation. How that was to be accomplished was to be determined by them exclusively. And if, as the return shows, it led in the end to the discharge of all the relators, with other employes, they have no just cause of complaint. Being clerks in the departments, they could not have been ignorant of the discussions of the commissioners, and of the reports which extended through several meetings.

No explanation from the relators could affect the judgment or action of the commissioners, nor present a reduction of expenses, through their discharge, if such result seemed necessary to the commissioners, and I do not see any principle or reason which would justify this court in reviewing their decision, or pronouncing it to be erroneous.

It would be no advantage to these men to order them to be reinstated in their clerkships, the duties of which are performed by other public servants, and when there is no funds with which to pay their salaries, and it would be an unjust burden on the public when it appears that their services are not needed.

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Other objections are taken by the respondent to these proceedings, amongst which is one of laches. But it is not necessary to pass upon them. For the reasons above mentioned the writs of *certiorari* should be quashed.

SUPREME COURT.

ROBERT W. FIELDING agt. JOHN LUCAS *et al.*

Demurrer — Bill in equity to dissolve partnership and to adjudge void certain attachments issued by creditors of the firm is demurrable by said creditors.

A bill in equity to dissolve a partnership and to adjudge void certain attachments issued by creditors of the firm, is demurrable by said creditors. As to such creditors the remedy at law against their enforcing said attachments is adequate. The parties can release the attached property by a bond. They can move to vacate the attachments. They can defend on the ground that the court issuing the attachments has no jurisdiction. If such creditors sue in the wrong court, it is not the province of a court of equity to bring them in as parties to answer an allegation to that effect and to have their suit arrested.

Second Department, September, 1880.

THE plaintiff filed a bill in equity alleging that on June 10, 1874, the plaintiff and the defendant John F. Walter, Jr., entered into an agreement in writing whereby they became copartners for three years from July 1, 1874, and that they have ever since continued their partnership under the firm name of Walter & Fielding. (2.) That the copartnership has been, since September, 1879, insolvent. (3.) That John F. Walter, Jr., one of the copartners, is indebted to the firm in \$5,047.64. (4.) That the said John F. Walter, Jr., and the other defendants acting by collusion with him, for the purpose of taking an undue advantage of the firm, and of giving a preference to the defendants Kate E. Walter and Alphonso H. Walter, who are sister and brother to the said John F.

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Walter, Jr., and to the remaining defendant John Lucas, over all the other creditors of the copartnership, caused three actions to be commenced in the marine court of the city of New York, one at the suit of said Kate E. Walter, one at the suit of the said Alphonsos H. Walter and another at the suit of the said John Lucas, all against the plaintiff and the said John F. Walter, Jr., by summons returnable six days after service thereof, and have caused a warrant of attachment to be issued in each of said actions against the defendants therein (this plaintiff and the said John F. Walter, Jr.), on the ground that they were non-residents of the city of New York and resided in Kings county, and upon no other ground. (5.) That the said actions were upon contract and the amount demanded in each exceeded \$1,000. (6.) That the plaintiff and the said John F. Walter had at all such times a place of business in the city of New York, and that said attachments were void for want of jurisdiction in said marine court to issue the same. (7.) That said firm owe creditors over \$15,000. (8.) That under said attachments the sheriff of the city and county of New York had seized all of the firm's property, and that if permitted to sell the same said property will be sacrificed and the other creditors will receive nothing. Wherefore the plaintiff prayed: (1.) That said copartnership be dissolved and an accounting had. (2.) That a receiver be appointed to marshal said assets. (3.) That said warrants of attachment be adjudged void. (4.) That said attaching creditors be enjoined in the meantime from enforcing said attachments.

The defendant Lucas, one of the attaching creditors, demurred to this complaint upon the ground that it contained no cause of action against him.

The demurrer was overruled at special term and judgment for the plaintiff ordered thereon by GILBERT, J., and the said defendant appealed.

David Crawford, for appellant, contended that his client was not a proper party to a suit for a copartnership account-

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ing, as he was not a member of the firm; that he was evidently made a party to enable the plaintiff to do indirectly what he could not do directly, *i. e.*, to have this court assume the control of process issuing out of another court of record in an action therein pending, and of which action it was conceded such other court had jurisdiction of the subject-matter of the action and of the parties. (2.) That the marine court had power to issue the attachments, and he referred to the opinion of McADAM, J., in *Nugent agt. Garvey* (*affirmed in 11 Hun*, 433, and the cases there cited).

J. A. Shoudy, contended that the attachments were void under the statute, as the defendants had a place of business within the city of New York, and the amounts claimed exceeded \$1,000 in each case, and being void it must be so declared whenever the question is raised, citing *Miller agt. Brinckerhoff* (1 *Denio*, 118); *Staples agt. Fairchild* (3 *N. Y.*, 41). (2.) That a court of equity certainly had power to dissolve a copartnership and to marshal the firm's assets, and in doing so would not permit itself to be impeded by void attachments at the suit of creditors.

BARNARD, *P. J.*—The complaint states no legal cause of action against the defendant Lucas; he is a creditor of the firm of Walter & Fielding.

He lives in Brooklyn and commenced an action against the parties in the marine court of the city of New York to recover his debt. The partnership had an office or place of business in the city of New York. The attachment was granted against the property of the firm by the judge of the marine court, based upon an affidavit of the non-residence of the parties. The partnership goods were seized under the attachment of Lucas and others. One of the partners commences an action against his copartner to settle the partnership affairs, to terminate the partnership, and Lucas is made a party defendant and relief is asked against him, that the

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attachment be decreed to be void, and that he prove his claim in this action, and in the meantime, pending the action, that he be enjoined from enforcing his attachment, and that a receiver be appointed.

As to Lucas and other attaching creditors, the remedy at law against their enforcing a void attachment is adequate. The parties can release the attached property by a bond. They can move to vacate the attachment. They can defend upon the ground that the marine court has no jurisdiction of the action. If Lucas has sued in the wrong court, it is not the province of a court of equity to bring him in as a party to answer an allegation to that effect and to have his suit arrested.

It is no aid to the complaint to aver that Lucas had bad motives in enforcing his claims in the marine court.

If he has a good debt, and proves it in a competent court, no question will be made whether his design was to harass the parties, or one of them, or to get an advantage over other creditors.

The judgment should be reversed, with costs to defendant Lucas.

DYKMAN, J., concurred; GILBERT, J., not sitting.

N. Y. SUPERIOR COURT.

EDWIN WILEY, appellant, agt. ANTHONY ARNOUX and WILLIAM HOCKHAUSEN, respondents.

*Costs — security for — Plaintiff residing in another county required to file —
Code of Civil Procedure, section 3268.*

Before the additional chapters of the Code of Civil Procedure went into operation (*i. e.*, September 1, 1880) it was necessary for a plaintiff residing in another county bringing an action in this court to file security for costs, but the Code, as amended, has changed the law on this subject.

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An order made on the 13th day of April, 1880, directing a plaintiff, who was a resident of Brooklyn, to file security for costs, *held* to be correct as the law then was.

General Term, November, 1880.

APPEAL from an order directing the plaintiff to file security for costs.

The plaintiff is a resident of Brooklyn. The order appealed from was made on the 13th day of April, 1880.

Herbert K. Cruikshank, for appellant.

John A. Foster, for respondent.

RUSSELL, *J.* — In the case of *Lewis* agt. *Farrell*, decided at this term of the court, it was held that before the additional chapters of the new Code went into operation it was necessary for a plaintiff residing in another county bringing an action in this court to file security for costs, but that the Code, as amended, had changed the law on this subject. The order appealed from was made before the change in the law occurred. It was correct as the law then was, and should be affirmed, with costs and disbursements. So ordered.

SPIER, *J.*, concurs.

The People *ex rel.* Higgins agt. McAdam.

SUPREME COURT.

THE PEOPLE *ex rel.* FRANCIS HIGGINS, as receiver of JOHN H. McCUNN, respondent, agt. DAVID McADAM, justice, appellant.

Summary proceedings — Jurisdiction — Prohibition.

The statute permitting summary proceedings founded upon an execution sale, affords the vendee of real estate a summary remedy against the judgment debtor in possession. It was not intended to extend the remedy to those in possession under the judgment debtor or his legal representatives.

Where the admitted facts take the litigation without the operation of the statute and, consequently, without the jurisdiction of the court, a writ of prohibition is the proper remedy (*Affirming S. C.*, 59 *How.*, 442).

First Department, General Term, November, 1880.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

APPEAL from an order granting a writ of prohibition to restrain summary proceedings in a landlord and tenant case to recover the possession of certain leasehold property.

Alfred McIntyre, for appellant.

Butler, Stilman & Hubbard, for respondent.

PER CURIAM. — 1. The tenant against whom these proceedings were instituted was not "a person holding over and continuing in possession of real estate which had been sold by virtue of an execution against such person." Her tenancy was not under McCunn's executors but under the receiver. No execution had been issued against her, nor against the receiver under whom she holds. This receiver did not take under McCunn's executors, but under the order of this court

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in certain actions pending therein. Nor was such receiver the servant or agent of the executors; nor was there collusion between the person in actual possession and the persons against whom the execution ran. The magistrate was, therefore, without jurisdiction. Prohibition will lie, because although there was jurisdiction in summary proceedings in general, there was none upon the facts set out in the applicant's affidavit. It is said that as the magistrate had jurisdiction in summary proceedings generally, he necessarily had jurisdiction to decide whether the case was within the statute. This argument is fallacious. The jurisdiction is special and limited, and the magistrate is strictly confined to the terms of the act. The original application and affidavit must show a case within the statute before the magistrate has authority even to issue the original summons to show cause. Under any other view these proceedings, which are useful enough if strictly pursued, would become a subject of grave apprehension. Ordinarily ejectment is the natural and appropriate common law remedy to recover the possession of lands, and we should not favor any attempt to effect the purposes of such an action under the forms of these summary proceedings. The object of the statute was to afford the vendee of real estate sold under execution a summary remedy against the judgment debtor in possession. It was not intended further to extend the summary jurisdiction of magistrates in these proceedings.

In this connection the fact should not be lost sight of that these proceedings cannot be stayed, and that there is no redress for the defeated and ejected tenant save restitution after judgment of reversal on *certiorari*, followed by an action for the damages sustained.

2. The receiver was authorized to institute the present proceedings. It was his right and duty to protect and defend his tenant. As an incident thereto he could institute a proceeding looking to that end.

For these reasons, as well as those assigned by Mr. justice BEACH, we think the order should be affirmed, with costs.

Pattison *et al.* agt. O'Connor.

SUPREME COURT.

ELIAS J. PATTISON *et al.*, respondents, agt. DENNIS J.
O'CONNOR, appellant.

Practice — Answer — Extension of time — When time to answer would have expired in five days, effect of stipulation extending time twenty days.

The plaintiff's attorney, when defendant's time to answer would have expired in five days, gave a written stipulation extending the time to answer twenty days:

Held, that the stipulation had the effect to give twenty days additional time to answer, and not fifteen days.

Held, further, that where the stipulation was signed on the sixth day of April, a demurrer served on the thirtieth was in time.

It was entirely proper to make a motion requiring the demurrer to be received, instead of delaying until after judgment was entered, and then moving to open the judgment.

The defendant's right to serve his demurrer within the twenty days' extended time, is clear and a substantial one, and the order denying its exercise is appealable.

First Department, General Term, December, 1880.

Before DAVIS, P. J., BARRETT and BRADY, JJ.

APPEAL from order of the special term denying motion, on the part of the appellant, requiring the respondents to receive service of the demurrer.

Stearns & Ames, for appellant.

S. E. Brown, for respondent.

DAVIS, P. J. — The complaint in this case was served on the 22d day of March, 1880. The twenty days to answer would have expired on the eleventh day of April, but, on the sixth day of April, the respondents' attorney signed a written

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stipulation, at the request of the appellant's attorney, which is in these words: "The time for the defendant Dennis J. O'Connor to answer the within complaint is hereby extended twenty days. Dated N. Y., April 6th, 1880. S. E. Brown, attorney for plaintiff." On the thirtieth day of April following the appellant's attorney served on the respondents' attorney a demurrer to the complaint, which was returned on the same day with notice that it was returned, because the time for the appellant to demur had expired before the 30th day of April, 1880.

The sole question is whether the stipulation by which the time to answer was extended twenty days had the effect to give twenty days additional time or only fifteen days. The respondents' counsel contends that it only operated to give the twenty days from April 6, 1880, at which time it was dated. This construction, we think, is clearly wrong. The language of the stipulation is: "The time to answer the within complaint is hereby extended, twenty days." This gave twenty days in addition to the time already existing, otherwise the time for answering would not be extended for that period. It is a very common thing for attorneys to apply to each other for a stipulation of this kind prior to the day on which the time to answer expires, probably more common than to wait until that day actually arrives, and a question has never arisen where an extension was given in the broad language of this stipulation, because no one, probably, has doubted that an extension of twenty days, given, for instance, the day before the time to answer expired, would enlarge the then existing time by the full twenty days and not by nineteen days only. If the respondents' attorney intended to limit the time of the extension from the date of the stipulation he should have specified twenty days from this date, or have specified the shorter number of days, and that would have left no doubt of the effect of the stipulation.

We think the court below erred in holding that the demurrer was not served in time. It was entirely proper to make

Shaw agt. Van Rensselaer.

the motion requiring the demurrer to be received, instead of delaying until after judgment was entered and then moving to open the judgment. The latter course might have been taken, undoubtedly, but that fact did not preclude the appellant's attorney from making the motion he did. He was not bound to wait till his client's rights were put in greater jeopardy by an actual judgment against him. And as his right to serve his demurrer within the twenty days extended time is clear and a substantial one, there seems to be no reason to doubt that the order denying its exercise is appealable.

We think the order below should be reversed, with ten dollars costs and disbursements, and an order entered directing that the demurrer be received or regarded as well served on the thirtieth day of April.

BRADY and BARRETT, JJ., concur.

N. Y. COMMON PLEAS.

SHAW agt. VAN RENSSELAER.

Examination of parties before trial — In action for damages for personal injuries under what circumstances defendant may examine plaintiff — Code of Civil Procedure, sections 872, 873.

In an action for damages for personal injuries a defendant may examine a plaintiff before answer if it appear that the facts stated in the affidavit, upon which the application is based, would tend to support a defense. The application will be denied when the affidavit upon which it is based fails to specify the special matters of defense he wishes to examine the plaintiff upon.

Special Term, December, 1880.

VAN HOESEN, J. — Under the former practice which recognized law and equity as two distinct systems, it was no objection to a bill of discovery that it sought to obtain evidence to be used in an action founded on a tort (*Gelston* agt. *Hoyt*, 1 J. C. R., 543; *Skinner* agt. *Judson*, 8 Conn., 528). But,

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in *Gelston* agt. *Hoyt*, chancellor Kent said that only in peculiar cases would the court of chancery sustain a bill of discovery to procure admissions that were to be used merely in mitigation of damages in an action of trespass. The chancellor did not say, however, that where the evidence sought to be elicited was material, a bill of discovery would not be sustained in aid of an action sounding in damages; and the ground upon which he dismissed the bill in that case was, that the evidence desired would not in anywise affect the issue in the action at law. In this case the evidence which the defendant is probably seeking may be material to the issue and important to his defense. He is entitled to show that the injury is not so great as the plaintiff claims, and this evidence he is at liberty to draw from the plaintiff himself. After issue joined the defendant could examine the plaintiff as to the extent of his injuries, and could obtain from the court the aid of a physician to discover, by an inspection of the plaintiff's person, what marks of a permanent character were left by the accident upon the plaintiff's body. The right of the court to order such an examination before trial was carefully considered, and placed upon indisputable ground by judge SAMUEL JONES in a very able opinion in the case of *Walsh* agt. *Sayre* (52 *How.*, 334). The right of the court to require a plaintiff in an action for personal injuries to submit to an examination, was considered to be beyond question by the supreme court of Iowa in *Scroeder* agt. *C., R. I. and P. R. R. Co.* (19 *Albany Law J.*, 234), and by the New York supreme court in *Harold* agt. *The New York Elevated R. R. Co.* (21 *Hun*, 268). It is not now necessary to determine whether or not the court would order the plaintiff to submit himself to the examination of a physician that the defendant might better frame his answer, for no application for such an examination has been made; but if the defendant will state what he expects to show by the plaintiff, and if it appear that the facts stated would tend to support a defense, an order for the examination of the plaintiff by the defendant's attorney will be made before

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answer. The affidavit now presented is so vague in its statements that I am at a loss to discover exactly what "the special matters of defense" are, which the defendant wishes to examine the plaintiff upon. He fails to specify them. I think this application should be dismissed, with costs, but with leave to renew it on other papers.

SUPREME COURT.

WILLIAM P. ELLISON and RODMAN B. ELLISON agt. ISAAC BERNSTEIN.

LOUIS LEVENSON and MICHAEL LEVENSON agt. ISAAC BERNSTEIN.

JACOB GLADKE and MORRIS J. GLADKE agt. ISAAC BERNSTEIN.

Attachments — What affidavits must show to entitle a person to, under subdivision 2 of section 636 of the Code of Civil Procedure.

It matters not what a person believes or disbelieves, the applicant for an attachment under subdivision 2 of section 636 of the Code of Civil Procedure, must show by proof of facts known to the witnesses who testify to them, that the belief in the intent to defraud by a disposition of the property is well founded. In other words the intent so to defraud must be a fair and logical sequence from facts proved.

It is not enough that a witness is willing to testify to a fact positively; he will not be allowed to so testify, when it is plain that he can have no actual knowledge on the subject. The sources of information must be given, so that the tribunal called upon to act can see that the facts sought to be proved are established by legitimate testimony.

* The facts (even if true), that the defendant was insolvent when he made the purchases, that he bought more goods than he needed, and that he failed to disclose his insolvency in the absence of any false statements, are not sufficient to show any intent to defraud.

Nor is it any evidence of intent to defraud, that the defendant refused to secure the plaintiffs; so long as the law allows preferences to creditors by a failing debtor, it cannot be proof of intent to defraud, that the defendant intends to do what the law permits.

Ulster Special Term, September, 1880.

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*Reserve effect 7 June 586.
 contra 2 9th Dec 470
 21 Jan 462
 53 Jan 462*

affirmed below 149m

Ellison agt. Bernstein.

MOTION by defendant in each of above actions to vacate attachments.

F. L. Westbrook, for defendant and motion.

John J. Linsen, for plaintiff opposed.

WESTBROOK, *J.* — A motion is made in each of the above entitled causes, to vacate the attachment issued therein. Such motions are founded solely upon the papers on which they were issued, and as the affidavits in the several cases are substantially alike, they will be considered together.

The plaintiffs in two of the cases are merchants doing business in the city of New York, and in the third case the plaintiffs are merchants in the city of Philadelphia.

The indebtedness in one case was contracted in August, 1879; in another in September, 1879; and in the third in October, 1879.

In the one action (that of the Messrs. Gladke) most of the material allegations are on information and belief, but in the other two they are positive. The allegations are:

1st. That defendant was insolvent when he made his purchase, which insolvency he fraudulently concealed with intent to defraud.

2d. That defendant had been "for some years a merchant doing a small business at Kingston and Rosendale, New York." That the defendant at the same time made other purchases on credit of "goods of about the value of \$12,000 or \$15,000," whilst the amount of goods he "would naturally have required for his fall trade was only the sum of about \$3,000."

3d. That defendant is indebted "to about the sum of \$17,000, and his assets are only about half that sum."

4th. That defendant has not paid for his spring purchases, but has notes outstanding therefor.

5th. "That he intends to dispose of his property with intent to defraud his creditors."

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6th. "That defendant has recently refused to secure claims against him, though large discounts were offered."

7th. That defendant has admitted inability to pay his debts as they matured, and that "he would secure or take care of the persons to whom he claimed to owe * * * 'confidential' moneys to the exclusion of other creditors."

8th. "That defendant owns no real estate, but all the real estate of which he is possessed is in the name of his wife."

9th. That defendant is pressed by creditors, and the Gladke attachment is referred to in the two other cases.

The ground upon which these attachments are sought to be maintained is that plaintiffs have established, as the 636 section of the Code requires them to establish, that the defendant "has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property," with intent to defraud his creditors.

As the plaintiffs seek an extraordinary remedy founded on *ex parte* affidavits, it is not too much to require that they make out a plain case. This remark has often been made, and much more often disregarded. It matters not what a person believes or disbelieves the applicant for an attachment must show by proof of facts known to the witnesses who testify to them, that the belief in the intent to defraud by a disposition of the property is well founded. In other words, the intent so to defraud must be a fair and logical sequence from facts proved.

The first criticism to be made upon the affidavits is, how do the affiants know that the defendant is insolvent; that he made other purchases to the value of \$12,000 or \$15,000, when all the goods he would naturally require was only \$3,000; that his indebtedness is \$17,000, and his assets only half that sum; that he had not yet paid for his spring purchases, and that he intends to dispose of his property with intent to defraud his creditors? Evidently these are facts not within the personal knowledge of the witnesses. They must have been unknown to the plaintiffs when the goods were

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sold, for if they had been, the sales would not have been made, and therefore the statements made must be the result, not of actual knowledge, but of subsequent inquiries. It is not enough that a witness is willing to testify to a fact positively; he will not be allowed so to testify, when it is plain that he can have no actual knowledge on the subject. The sources of information must be given, so that the tribunal called upon to act can see that the facts sought to be proved are established by legitimate testimony. The ordinary witness does not as a rule discriminate between actual knowledge and information, and a party who readily believes what it is his interest to believe, should, in an *ex parte* affidavit, show that he has knowledge, if he wishes his statement to be taken as evidence.

Assuming, however, the truth of the facts, that the defendant was insolvent when he made the purchases—that he bought more goods than he needed, and that he failed to disclose his insolvency—under the authority of *Nichols* agt. *Pinner* (18 *N. Y.*, 295), these facts, in the absence of any false statements, are not sufficient to show an intent to defraud. *Wright* agt. *Brown* (67 *N. Y.*, page 1), and the case marked “Anonymous,” on page 98 of the same volume, are not in conflict with that just cited, but on the contrary its soundness is recognized. There is no such detailed statement in these cases of debts and resources, of past, present and possible future business of defendant, as to justify the inference that the defendant knew when he made these purchases that he could not pay for them, and therefore meant to defraud.

The remaining grounds for the issue of the attachments are equally bad. It was no evidence of intent to defraud, that the defendant refused to secure the plaintiffs (*Vandenburgh* agt. *Hendricks*, 17 *Barbour*, 179), and so long as the law allows preferences to creditors by a failing debtor, it certainly cannot be proof of intent to defraud that the defendant intends to do what the law permits.

The attachments must be vacated with costs. If, however, the plaintiffs in either action wish to review this decision, the

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operation of the orders to be entered will be stayed for ten days to enable them to make an application to the court for a further stay pending an appeal upon such terms as shall be just.

NOTE. — The decision in this case was affirmed at general term in November, 1880.—[REP.]

N. Y. COMMON PLEAS.

McCoon agt. WHITE.

Examination of parties before trial — requisites of an application by defendant for the examination of plaintiff where the suit is upon a promissory note — Code of Civil Procedure, sections 872, 873.

It was a well settled rule that the complainant in a bill of discovery must show a good cause of action or a good defense. This is still an indispensable requisite of an application for the examination of an adversary.

Whilst there is no reason for introducing the unwarranted and unwarrantable rule that a party who seeks to examine his adversary before trial must swear that he intends to introduce the examination as evidence on the trial, it is eminently proper to adhere to the equity practice which required the party seeking a discovery to state that he expected to prove by the examination the facts which he alleges to lie peculiarly within the knowledge of the person whom he seeks to examine.

In an action on a promissory note where the defendant seeks to examine the plaintiff before answer the affidavit is defective, in that it does not state that the defendant expects to prove that the note in suit was not, either before it matured or at the time of its maturity, in the hands of one who could have collected it from the defendant, and that it came after its maturity into the hands of the defendant.

The affidavit is also defective where, admitting everything it alleges, it does not show that the defendant has a defense.

Special Term, December, 1880.

VAN HOESEN, J. — The affidavit of the defendant is defective in this, that it does not state that the defendant expects to

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prove that the note in suit was not, either before it matured or at the time of its maturity, in the hands of one who could have collected it from the defendant, and that it came after its maturity into the hands of the plaintiff. While there is no reason for introducing the unwarranted and unwarrantable rule that a party who seeks to examine his adversary before trial must swear that he intends to introduce the examination as evidence on the trial, it is eminently proper to adhere to the equity practice which required the party seeking a discovery to state that he expected to prove by the examination the facts which he alleges to lie peculiarly within the knowledge of the person whom he seeks to examine (*Primmer* agt. *Patten*, 32 *Ills.*, 528; *Barbour's Chancery Prac.* [2d ed.], vol. 2, *marginal page* 106, *note* 20). The affidavit is also defective because, admitting everything it alleges, it does not show that the defendant has a defense. It would not constitute a defense that the note was given for the accommodation of the payee, and that it came after maturity into the hands of the plaintiff, who parted with no value when he received it. Suppose that the note when it matured, or previously to that time, was in the hands of a *bona fide* holder, what defense would the defendant then have conceding the truth of everything he states? It was a settled rule that the complainant in a bill of discovery must show a good cause of action or a good defense. This is still an indispensable requisite of an application for the examination of an adversary (*Williams* agt. *Harden*, 1 *Barb. Ch.*, 298). The motion for the examination of the plaintiff must be dismissed, with ten dollars costs, but with leave to renew on further papers, and the defendant's time to answer will be extended twenty days.

Kennedy agt. Kennedy.

N. Y. SUPERIOR COURT.

MARGARET KENNEDY agt. WILLIAM H. KENNEDY.

Divorce—What necessary to sustain action for, on the ground of cruel and inhuman treatment.

In an action for a limited divorce on the ground of cruel and inhuman treatment, it is unnecessary to sustain the charge that there should be personal violence.

Threats and menace from which danger to health or life may be apprehended is sufficient, though the cause of apprehension should not only be weighty but such as clearly showing that the duties and obligations of the marriage state cannot be discharged.

Charges of infidelity, made maliciously without probable cause, are sufficient to sustain the action.

*General Term, December, 1880.**Before SPEIR and RUSSELL, JJ.**Roger A. Pryor, for plaintiff.**Develin & Miller and W. A. Beach, for defendant.*

SPEIR, J.—The action is brought by plaintiff, the wife of the defendant, for a limited divorce, on the allegation of cruel and inhuman treatment, and for such conduct on the part of the husband towards his wife as rendered it unsafe and improper for her to cohabit with him.

Upon a careful examination of the record, we see no reason for complaint in regard to the findings of the facts by the court below. The only question which it is necessary to examine on this appeal, therefore, is one of law, and it was earnestly discussed by counsel on the argument. The defendant claims that the evidence did not uphold the legal conclusions of the court. In support of this proposition refer-

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ence is made to the decision of the court of appeals when this case was before it in review of the order for alimony (73 *N. Y.*, 374), when the issues in the pleadings had not been determined. It was claimed by the defendant that it did not appear, from all the papers and proofs presented, that the plaintiff ought to recover, and that, therefore, alimony should be denied. The court say if the facts stated in the complaint are clearly not sufficient, if true, to constitute a cause of action, alimony cannot be granted. And it was held that it would not pass upon the merits of conflicting allegations on proofs upon a motion for alimony; that such a motion being one of discretion as to the propriety of granting it, the court would not review the exercise of that discretion in the court below. The only question, therefore, decided by the appellate court, was that the court below had the power to allow alimony, and the appeal was dismissed. The chief justice, in commenting upon the difficulty of defining in precise words what constitutes "cruel and inhuman treatment," quotes the following (1 *Bishop on Mar. and Div.*, 717, *note*) as being concise and comprehensive: "There must be either actual violence committed, with danger to life, limb or health, or there must be a reasonable apprehension of such violence." Consequently, the case referred to is no authority, the case as now presented not being before the court. The decision furnishes us with the definition of "cruel and inhuman treatment," and, so far, is useful as an authority.

It seems to us from the expressive words used in the statute it is unnecessary there should be personal violence to constitute cruel and inhuman treatment. It plainly refers in terms to a species of unkind treatment accompanied by threats and words of menace, the inevitable consequence, of which, by continued indulgence, violence may reasonably be apprehended, and result to the wife, unless prevented, in danger to life, limb or health. It is, however, of the greatest importance that the cause of apprehension should not only be weighty, but such as clearly showing that the duties and

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obligations of the marriage life cannot be discharged. The mutual dependence of our mental and physical organizations creates a mysterious sympathy, and exists under certain conditions, that when disturbed it seems impossible to distinguish between them as to the cause and effect produced by either. The defendant's treatment of his wife was cruel and inhuman within the meaning of the statute, and such as to render it unsafe for her longer to endure his conduct and continue to cohabit with him. He on various occasions wantonly and maliciously charged her with unchastity and infidelity to her marriage vows. Shortly after the birth of a child, he reproached her with a denial that he was the father of the child. On another occasion he said "he wished he could murder her." "I will keep you here, living miserably, and I will make you live a wretched life yet." These charges of infidelity, as appears from the evidence, were frequent and continuous, and were urged maliciously and without probable cause. He declared to various witnesses "that he never believed his wife to be guilty of adultery, and never suspected her of such guilt."

The cases are too numerous for citation, that false and malicious accusations of adultery against the wife is "cruel and inhuman treatment," in the sense of the statute. The conduct of the defendant, not only in this respect, but his foul and blasphemous language and threats of violence towards her, seem to have been habitual.

Under all the circumstances of the case, we are of the opinion, as expressed in some of the cases, "that the court must not wait until the threats are carried into execution, but must interfere when the words raise a reasonable apprehension of violence." The judgment should be affirmed.

Matter of Ketchum's Application.

N. Y. COMMON PLEAS.

In the Matter of KETCHUM'S APPLICATION.

*Examination of parties before trial — Code of Civil Procedure, section 872 —
Requisites of an affidavit on which an application is made for the examination of witnesses where no action is pending.*

Since the amendment which was made in 1879 to subdivision 6 of section 872 of the Code of Civil Procedure, it is requisite and necessary, in an affidavit on which an application is made for the examination of witnesses where no action is pending, to state what the circumstances are which render it necessary for the protection of the applicant's rights that the witnesses' testimony should be perpetuated.

The meaning of the amendment to subdivision 6 is to require the applicant to show that he is in danger of losing the evidence of his right before it could be judiciously investigated. To prove that such danger exists it is incumbent on the complainant to allege that he has an interest, present or contingent, in the property, and that the defendant has or claims to have an interest. He is further bound to show that he is in danger of losing his witnesses by sickness, age, death or departure from the jurisdiction, or that his case rested upon the evidence of only one witness. Where he could at once bring a suit, he is bound to show that it has been commenced. If no action is pending, he is obliged to explain why he is not able to maintain an action, the ordinary reasons being that the right of action belonged to the adverse party, or that the adverse party had raised some impediment (an injunction for example) to an immediate trial in a court of law.

Special Term, December, 1880.

VAN HOESSEN, J. — Section 872 of the Code of Civil Procedure, as originally enacted, made no change in the law respecting the perpetuation of testimony, for that section was substantially a re-enactment of article 5, chapter 7, title 3, part 3 of the Revised Statutes. The construction of that article of the Revised Statutes was settled by the adjudications of the old supreme court, of the chancellor and of the present supreme court. It is not necessary to refer more par-

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ticularly to the decisions for the amendment which was made, in 1879, to subdivision 6 of section 872, has so changed the law respecting the perpetuation of testimony that they no longer aid us in determining what allegations are requisite and necessary in an affidavit on which an application is made for the examination of witnesses where no action is pending. It is now necessary for the applicant to show to the judge by affidavit what the circumstances are which render it necessary for the protection of the applicant's rights that the witness' testimony should be perpetuated. This is a most important change in the law, for the Revised Statutes made no such requirement, it being settled that an affidavit was sufficient which contained the statements prescribed by section 34, 2 Revised Statutes, 398. In his preliminary note to chapter 9, article 1, title 3 of the Code of Civil Procedure, Mr. Throop says that he has endeavored to throw "some guards around the proceedings to examine a person expected to be made a party in order to close a door against abuses, which the original statute leaves open." The guards which he speaks of are the provision that the applicant shall set forth the circumstances which make it necessary to perpetuate the testimony. This leads us at once to inquire why it ever was necessary to perpetuate testimony. The answer is to be found in the decision of the court of chancery, for it was the necessity of the case which first led the court to entertain bills for the perpetuation of testimony. We find, on referring to the books, that it was deemed necessary to perpetuate testimony where a person interested in property was in danger of losing the evidence of his right before it could be judicially investigated. To prove that such danger existed it was incumbent on the complainant to allege that he had an interest, present or contingent, in the property, and that the defendant also had, or claimed to have, an interest. He was further bound to show that he was in danger of losing his witnesses by sickness, age, death or departure from the jurisdiction, or that his case rested upon the evidence of only one witness. Where he

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could at once bring a suit he was bound to show that it had been commenced. If no action was pending he was obliged to explain why he was not able to maintain an action, the ordinary reasons being that the right of action belonged to the adverse party, or that the adverse party had raised some impediment—an injunction, for example, to an immediate trial in a court of law.

The meaning of the amendment to subdivision 6 is, in my opinion, to require the applicant to show substantially the same state of facts which a bill to perpetuate testimony disclosed; and I hold that it is not necessary to perpetuate testimony for an action hereafter to be brought when no reason exists why the applicant should not forthwith bring his action. Where an action has been brought the adverse party may be examined under subdivision 5 of section 872, and all that the applicant need then show is that he has a good case and that he expects to prove all or some of the facts of his case by the adverse party. Of course the formal parts of the affidavit must contain the allegations mentioned in the first four subdivisions of the section. The affidavit of the applicant states that she intends to bring an action, but she does not show that any reason exists for her postponing the commencement of the litigation. If she does not know all the facts connected with her cause of action she may, after a summons has been served, obtain an order for the examination of the defendant that she may learn from him the details which she needs to know in order to frame her complaint. But as she can sue at once, if she chooses so to do, the person whom it is sought to examine ought not to be annoyed by going through an examination which may be the beginning and the end of the applicant's proceedings.

The motion to dismiss the order for the examination will be granted; but as the question decided is a new one, no costs will be imposed.

NOTE.—Where the defendant seeks to obtain an order for the examination of the plaintiff before the answer is served, his affidavit must show

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what his defense is, and that it is a good one, and also state what material facts he expects to prove by the examination. It need not state that he intends to introduce the examination as evidence at the trial. This was held by judge VAN HOESEN in two cases: *Shaw* agt. *Van Rensselaer* (*ante*, 143) and *McCoon* agt. *White* (*ante*, 149). The judge said that a bill of discovery which stated the matters which he required in the affidavit would be good in substance, and no more need be set forth in the affidavit than was requisite in the bill of discovery. The formal parts of the affidavit, it was said, must conform to the requirements of section 872. The authorities cited by the judge were 2d volume *Barbour's Chancery Practice* (pages 101-116); *Williams* agt. *Harden* (1 Barb. Ch. R., 298); *Primmer* agt. *Patten* (32 Ill., 528; *Story's Eq. Jur.*, sec. 1493, b). [REP.]

COURT OF APPEALS.

WELLS R. RITCH, appellant, agt. JOHN B. SMITH, respondent.

Principal and agent — Extension of mortgage debt by agent when unauthorized.

An agent authorized to receive payment of interest accruing on a mortgage and to collect the principal, and who received a portion of the principal before it was due, is not authorized to extend the payment of the mortgage debt after it became due.

To uphold the granting of such extension the agent should have been specially authorized thereto, or it should appear that the act was embraced within the powers allowed to be performed or was ratified.

Where the plaintiff and agent were father and son residing in different states, the latter in the same city with those who were to make payments:

Held, that although this relationship might imply greater confidence in management and an easier disposition to ratify unauthorized acts, it does not imply an express prior authority to do unusual and undesirable acts.

While a principal is presumed to have notice of the acts performed by his agent in the usual course of his agency, such presumption does not extend to acts clearly not within the agency (*Affirming Same Case*, *ante*, 13).

Arnoux, Ritch & Woodford, for respondents.

Blumensteil & Archer, for appellants.

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THE facts appear in the report of the case at special term (*See, ante*, 13). On appeal from the judgment rendered at special term the following opinion was rendered.

First Department, General Term, March, 1879.

PER CURIAM. — A careful examination of the evidence in this case has satisfied us that the learned judge erred in his finding in regard to the authority of Thomas G. Ritch to act for and on behalf of the plaintiff in this action in regard to the mortgage in controversy. We think that the evidence herein, in the absence of any testimony by the plaintiff on the subject, justifies the finding that on the 5th of September, 1873, the plaintiff, by his agent, Thomas G. Ritch, for a valuable consideration paid by the defendant Herman Steinert, then the owner of the mortgaged premises, agreed with said Herman Steinert, in writing, to extend the time for the payment of the principal sum secured by said bond and mortgage to November 1, 1875, and that if the agent had not full authority to make such a contract, it was subsequently ratified.

For these reasons we think a new trial should be granted, with costs to abide event.

On appeal from the decision of the general term granting a new trial the following opinion was rendered by the court of appeals.

November, 1880.

FOLGER, *Ch. J.*—It is not needful that we determine whether the respondent Smith is to be treated in equity as a surety, nor whether the arrangement between Mr. Ritch and Mr. Steinert was an extension of the time for payment. We are unable to find that Mr. Ritch had the authority to make an arrangement having that effect, or that if he did make such arrangement, it was ratified by the plaintiff. Mr. Ritch, in what he did, was the agent of the plaintiff. It does not

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appear that he had an especial authority over the bond and mortgage. He had charge of the plaintiff's interest in them. It does not appear that that interest was to have payment made of part before it was payable, and an extension given of the time of payment of the rest. A charge of the plaintiff's interest was no more than to take good care of the papers, if in the agent's custody, to see that payments of the interest and principal were made as they became payable, and to remit the money when received, and to advise of non-payment, if payments were not regularly made, and to suggest the need to enforce collection, if such need arose. It appeared that the plaintiff had personal custody of the mortgage from the time of the assignment of it to him until it was given to his attorneys for foreclosure, and that he had at that time the custody of the bond. It is strongly urged that the agent had possession of the bond at the times respectively when payments were made upon it. There is no direct proof of it. The agent, in testifying, says that he sent the mortgage to the plaintiff at Stamford, when he made the transfer of it to him. He does not, in this connection, name the bond as having also been so sent. It is argued from this that the bond was retained by the agent, and that the possession of it gave him seeming authority to take payment in advance. But it appears that the plaintiff had the bond in his possession at some time together with the mortgage, for he delivered them together to his attorneys for prosecution. It also appears that the agent made no indorsement on the bond of the payments, but gave receipts and lent the money to the plaintiff, who credited it on the mortgage. The inference would be forced that the agent had the bond in possession. It was doubtless in court at the trial, and had there been indorsements upon it of these payments in the writing of the agent, it would have appeared. The most reasonable inference is that the plaintiff had possession of the bond, as well as of the mortgage, from the time of the transfer until they were handed over for suit.

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There is not shown any direction from the plaintiff to the agent to collect money on them in anticipation of the day of payment named in them, or to extend the time of payment of the principal sum. On the contrary, the agent denies recollection of direction thereto. All that was expressed by the plaintiff to his agent was a willingness to take payment of money before it was payable. The agent testifies that he knew that he had no regular authority to make an extension of time. It is plain that the general authority of the agent did not permit an act of extension, and that there is not direct evidence of special authority therefor given in terms (*Smith agt. Kidd*, 68 N. Y., 130). It is claimed that the circumstances of the case are enough from which to imply express authority. The plaintiff and agent were father and son, residing in different states, the latter in the same city with those who were to make payment. This relationship may imply greater confidence in management, and an easier disposition to ratify unauthorized acts ; but we are not able to see that it implies an express prior authority to do unusual and undesirable acts. The plaintiff received the avails of the anticipated payments, and hence knew that they were made out of due time ; but it was in pursuance of a prior willingness expressed, on a request to do so, which request gave no information of the desire or purpose of an extension of time of payment. And the fact that the agent sought from the plaintiff the consent to take payment of part before it was due, is against instead of for a prior authority to do that act or other act out of the usual course. The use by the agent, when a witness, of the phrases "no regular authority," "not to my recollection," and his statement of the reason given by Mr. Steinert for making payment before it was due, with the accompanying exception of that reason from the communication made by the agent to the plaintiff, are ingeniously reasoned upon by the learned counsel for the respondent ; but no more is effected thereby than to excite suspicion ; there is not established a ground for reasonable inference.

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Nor is there direct evidence of a ratification by the plaintiff of all the agent's acts. The plaintiff received the money, and he must be held to have sanctioned all that accompanied the payment of it, and that came to his knowledge but not that of which he was not informed. We have already shown how far the information to him went.

There is an entire absence of direct evidence of previous authority or subsequent intelligent ratification. If it be granted that these are circumstances that excite a suspicion that there was authority before, or information after the agent's act, they are not sufficient to create a reasonable probability thereof.

The judgment of the general term should be reversed, and that of the special term affirmed.

All concur.

N. Y. COMMON PLEAS.

MINNIE L. MORGAN agt. ANNA VON KOHNSTAMM, NOW ANNA
R. VERDALE.

Practice — Supplementary proceedings — When and how receiver to be appointed — Examination of a third party — Code of Civil Procedure, section 2464.

In a proceeding for the examination of a third party, a receiver cannot be appointed without notice to the judgment debtor.

Where such judgment debtor is entitled to the income for life of a trust fund under a will, the executors of the trust cannot be restrained from applying the proceeds of the trust.

There was no authority under the former Code for the appointment of a receiver in a proceeding for the examination of a third party, alleged to have property of, or to be indebted to the judgment debtor. A receiver could be appointed only in a proceeding instituted for the examination of a judgment debtor.

By the provisions of the Code of Civil Procedure, section 2464, a receiver cannot be appointed before an order or warrant, to be examined, is

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served upon the judgment debtor, without ten days' notice to the judgment debtor, unless he cannot, after due diligence, be found in the state.

General Term, December, 1880.

DALY, Ch. J. — This was the examination by order of a third party, in a proceeding supplementary to execution, in which proceeding an order was made, without any notice to the judgment debtor, appointing a receiver and enjoining the executors of a trust fund under a will, from making any disposition of the property so held by them in trust. The trust created by the will was to apply the rents, issues and profits of the sum of \$13,000, which the executors were directed to invest, to the use of Hannah Von Kohnstamm, the judgment debtor, during her natural life.

There was no authority under the former Code for the appointment of a receiver in a proceeding for the examination of a third party alleged to have property of, or to be indebted to, the judgment debtor. A receiver could be appointed only in a proceeding instituted for the examination of a judgment debtor.

It was so held in several reported cases, and has been held in a comparatively recent case (*Holbrook agt. Ogler*, 40 N. Y. Sup. Ct. R., 33; *id.*, 49 How., 289), in which the question was carefully considered by chief justice MONELL, at special term, and afterwards by the general term, upon appeal, and in which case the prior decisions were all reviewed. By the provisions of the new Code, section 2464, a receiver cannot be appointed before an order or warrant, to be examined, is served upon the judgment debtor, without two days' notice to the judgment debtor, unless he cannot, after due diligence, be found in the state.

In addition to this, the injunction restraining the executors from applying the proceeds of the trust to the use of the *cestui que trust*, for such was its effect, was improper. All that could be reached, to be applied to the satisfaction of the judgment, would be a surplus beyond what was necessary for the

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judgment debtor's support, and this could be done only by an equitable action in which the judgment debtor and executors would have to be made parties, as in *Williams agt. Thorn* (70 N. Y., 270).

The order should be reversed.

COURT OF APPEALS.

JOHN ZIMMERMAN *et al.*, plaintiffs and respondents, agt. PROSPER ERHARD *et al.*, defendants and appellants.

Partnerships — Use of the words “& Co.,” when representing the wife, not a violation of the statute — Goods sold on different days on credit constitute a separate and distinct cause of action.

The statute (*Laws of 1833, chap. 281*) which provides that “no person shall transact business in the name of a partner not interested in his firm, and when the designation ‘& Co.’ is used, it shall represent an actual partner or partners,” is highly penal, and the use of the words “& Co.,” when representing the wife of such person, is not a violation of the statute. The name of the wife when so used is a real one and the words “& Co.,” when so employed, are in no sense fictitious.

Where goods are sold on different days, each sale constitutes a separate and distinct cause of action, and the plaintiff may, at his election, bring separate actions for each, or for all of them together.

Decided December, 1880.

THE plaintiffs, John and Mary Zimmerman, sued in the New York marine court to recover a bill of goods sold by them to the defendants. It appeared that the plaintiffs did business under the firm style of “J. Zimmerman & Co.,” and the goods were sold by them in their copartnership name. Upon the trial before Mr. justice McADAM it was objected: 1. That as the plaintiffs were husband and wife, they could not and did not form a legal partnership, and that the use of

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the words "& Co." under such circumstances was a violation of the statute (1833, *chap.* 280) as construed in *Swords* agt. *Owen* (43 *How. Pr.*, 176) and *Wood* agt. *Erie Railroad Company* (8 *Hun*, 648). 2. That there was another action pending between the same parties for the same cause.

The objections were overruled and judgment was directed for \$1,710.49, with costs.

The judgment having been affirmed by the general terms of the marine court and court of common pleas, the defendants (by leave of the latter court) appealed to the court of appeals.

Edward Van Ness, for appellants.

Thomas V. Cator, for respondents.

MILLER, *J.*—The defendants interpose as a defense to the plaintiff's demand, that the plaintiffs were not copartners, and that the plaintiff John Zimmerman did business under the name of "J. Zimmerman & Co.;" that the words "& Co." do not represent any real party, and that the same are used in violation of chapter 281, Session Laws of 1833, which provides that no person shall transact business in the name of a partner not interested in his firm, and when the designation "and company," or "& Co.," is used, it shall represent an actual partner or partners. The defense rests upon the supposition that Mary Zimmerman, the wife of the plaintiff John Zimmerman, was intended by the words "& Co.," and that no partnership can exist between husband and wife, and therefore the use of the words was illegal and a violation of the statute. That plaintiffs were husband and wife is only established by the testimony of John Zimmerman that the firm was composed of himself and his wife, Mary Zimmerman. Whether Mary was the wife of John Zimmerman at the time of the sale is not shown; nor is there any finding or request to find to that effect. But assuming

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the proof on this subject was sufficient, we think the use of the words "& Co." for the name of the wife was not a violation of the statute cited.

The provision in question is highly penal and will not be extended. It was intended to prevent the use of the name of a person not interested in a firm, and thus inducing a false credit to which it was not entitled (*Wood agt. Erie Railroad Company*, 72 *N. Y.*, 196, 198). It does not apply to, and is not intended to include, the use of a real name of an actual partner, even although such partner was under a disability at the time. The use, therefore of the name of a *feme covert*, an infant or person of unsound mind, as one of a firm, where there was no intention to impose upon the public by obtaining undue credit, cannot be regarded as a violation of either the letter or the spirit of the statute cited. The name used in this case was a real one, and the words "& Co." were in no sense fictitious or unlawful within the meaning of the statute. Without considering the question whether a married woman can be a partner of her husband, it is quite obvious that such disability is not available to the defendant in this action, upon the ground set up in the defendants' answer, that the words "& Co." did not represent a real party, and the answer referred to constitutes no defense to the plaintiffs' demand.

The defense that another action was pending for the same cause of action is also without merit. The former case, for which a recovery had been had between the parties, was brought to recover the value of goods sold and delivered at a date prior to those for the recovery of the value of which this action is brought; and the proof showed that they were all sold upon a contract for a credit of four months. Under this state of facts each sale was separate and distinct, and a cause of action accrued when the time of credit expired and as the several amounts became due.

The different sales did not constitute one entire and indivisible demand, and the plaintiffs could bring separate actions

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for each separate sale, or for all of them together, as they saw fit. The different demands were like several promissory notes or several distinct trespasses, and in the nature of separate and distinct transactions, for each of which a separate action might be brought (*Secor* agt. *Sturgis*, 16 *N. Y.*, 548, and *authorities there cited*; *Staples* agt. *Goodrich*, 21 *Barb.*, 317).

The rendering of an account containing all the items does not change the nature of the contract or evince that the transactions were not separate and distinct. The cases cited to sustain the rule, that the account sued upon was entire and could not be split up so as to form the basis of separate causes of action, are only applicable where successive suits are brought for separate items of a current account or for separate installments becoming due under the same contract, and are not analogous to the facts presented in the case at bar.

There was no error, and the judgment must be affirmed.

All concur.

N. Y. COMMON PLEAS.

WILLIAM N. EVERSON, plaintiff and respondent, agt. STEPHEN H. POWERS, defendant and appellant.

Master and servant — Damages — measure of — in action by employe discharged without cause.

Damages in an action for wrongful discharge from employment are recoverable up to the time of trial (*Limiting Toles* agt. *Hazen*, 57 *How. Pr.*, 516).

General Term, January, 1881.

ON reargument of an appeal from a judgment rendered in the marine court in an action for damages for a wrongful discharge from employment.

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Jacob Fromme, for plaintiff.

Armstrong & Briggs, for defendant.

J. F. DALY, J. — In his opinion delivered on reversing this judgment the chief judge, citing the cases which bore upon the rule of damages, concluded that the plaintiff might recover his actual loss down to the day of trial, and was not confined to damages suffered prior to the commencement of the action (*Hochster* agt. *De Latour*, 2 *E. & Bl.*, 678, 71; *Maguire* agt. *Woodside*, 2 *Hilt.*, 59; *Toles* agt. *Hazen*, *Com. Pl. Dec.*, 1878; 57 *How. Pr.*, 516; 18 *Alb. Law Jour.*, 476). In *Toles* agt. *Hazen* the rule is stated somewhat differently, and damages were confined to those occurring at the commencement of the action. But *Hochster* agt. *De Latour* was cited as authority, as was *Moody* agt. *Leverick* (4 *Daly*, 401) and *Dillon* agt. *Anderson* (43 *N. Y.*, 231, 237). Those cases do not confine plaintiff to the actual loss suffered at the time of the commencement of the action, but unqualifiedly hold that the damages must be an indemnification for the loss sustained. In concurring in *Toles* agt. *Hazen*, judge VAN HOESEN stated expressly that he regarded *Maguire* agt. *Woodside* as authority. In that case it was expressly held that the damages down to the day of trial might be recovered. *Toles* agt. *Hazen* may, therefore, be considered as approving the doctrine established by the cases cited by both judges who decided the case. The judgment in that action was properly reversed, because the justice allowed a recovery for wages to accrue after the trial and down to the expiration of the period of service.

In this case the trial was had after the term of service expired, although the action had been brought during the term. The damages suffered by plaintiff had been ascertained and become fixed, and in accordance with the current of decisions in our own court plaintiff was entitled to recover to that extent.

The judgment should be affirmed, with costs.

DALY, Ch. J., and VAN HOESEN, J., concurred.

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SUPREME COURT.

THE JOHNSTON HARVESTER COMPANY agt. PETER MEINHARDT
and others.

Injunction — "Rights of trades unions" — When injunction against will not be granted — The court cannot go beyond preventing breaches of the peace.

The orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such right, is now permitted by statute (*Chapter 19, Laws of 1870*).

This statute does not, however, permit an association or trades union, so-called, or any body of men in the aggregate, to do any act which each one of such persons in his individual capacity and acting independently had not a right to do before the act was passed.

This act does not shield a person from liability for his action in intimidating or coercing a fellow-laborer so that he shall leave his employer's service. Such conduct is, in its nature, a trespass upon the rights of business of the employer.

If he compels by assault or violence, by threats, by acts of coercion, a fellow-craftsman to leave the employ of another, he commits an offense against the rights of such person which is hardly distinguishable from an act which should itself injure or destroy the product of that man's labor. It is a direct injury to property rights and may be regarded as the sole proximate cause of such injury, for the laborer in such cases has not freedom of action and cannot himself be deemed to take any part in the transaction.

On a motion in behalf of plaintiff for an injunction against the defendants, who are members of a trades union known as the "Iron Moulders' Union," to restrain them from interfering with the business of the plaintiff, or intermeddling with any person in the employ, or anyone with whom the plaintiff is negotiating to enter into such employment, the facts showed a combination of the defendants and an enticement by them of laborers from the plaintiff's shops, and others who were about to enter the employ of the plaintiff, by means of arguments, persuasion and personal appeals, accompanied by payment of traveling expenses to other localities:

Held, that the laws of this state do not permit an injunction to be granted for such a cause.

There being no sufficient evidence of violence, force or intimidation or coercion on the part of the defendants against the plaintiff's laborers,

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the position that a confederation of persons to entice away workmen or servants from the plaintiff's employ is an unlawful act, and may be restrained by injunction is untenable.

Although it is the duty of courts and of peace officers to see to it that such controversy shall not result in breaches of the peace, or in such acts as may tend to breaches of the peace, and to hold alike the employer and the employed to the payment of damages for any violation of contract, and to responsibility for any acts which immediately and in a legal sense affect the rights of either, yet the court cannot go beyond preventing breaches of the peace.

Monroe Special Term, November, 1880.

THIS is a motion in behalf of the plaintiff for an injunction against the defendants, to restrain them from interfering with the business of the plaintiff, or intermeddling with any person in the employ of the plaintiff, or who is about to enter into its employ, or any one with whom the plaintiff is negotiating to enter into such an employment.

Mr. Cogswell, for plaintiff.

Mr. Cochrane and D. A. Adams, for defendants.

MACOMBER, J.—It appears from the complaint that the plaintiff is a business corporation engaged extensively in the manufacture of agricultural implements, at the village of Brockport, in this state; that in such business a large number of iron moulders is required; that all, or nearly all, of the defendants were formerly, and up to the 2d of October, 1880, at service for the plaintiff as iron moulders; that on the said second day of October all of the iron moulders except four left the plaintiff's employ, for the ostensible reason that the plaintiff did not pay sufficiently high wages. The complaint further alleges that the defendants are members of an association known as the "Iron Moulders' Union," and "that they have combined and confederated together to prevent the plaintiff from supplying the places of the iron moulders who

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have so left its employment, and to prevent iron moulders whom the plaintiff had hired, or was about to hire, from entering into the plaintiff's employ, unless said plaintiff would pay the scale of wages prescribed by said "Iron Moulders' Union" and submit to the other requirements thereof; that among such requirements is this: "that said plaintiff would discharge all persons from its employ as iron moulders who were not members of such union; and that said defendants have combined and confederated together to interfere with and prevent the said plaintiff carrying on its said business."

The complaint further states that, in pursuance of such combination and confederacy, the defendants have interfered with and prevented persons from hiring to the plaintiff, and that this was done "sometimes by intimidation and abuse, sometimes by persuasion, and sometimes by offering pecuniary reward;" that the said defendants have also, in pursuance of such unlawful combination and confederacy, and by like unlawful means and inducement, induced many persons who had entered into the employment of the said plaintiff as iron moulders, to leave and abandon the same.

Thence follow allegations to the effect that such acts have been repeated from day to day, and that the defendants threaten to, and the plaintiff believes that they will, continue the same daily, and even hourly, unless the plaintiff yields to their demands or the court interferes, and that the damage to the plaintiff, if such acts are continued to be permitted, will be irreparable. These allegations are amplified by the affidavits in support of the motion, which show that in repeated instances the defendants, or some of them, have induced persons to leave the plaintiff's employ, and others who were about to enter into such employment to desist from so doing, and have paid them money therefor, for the purpose of paying their passage to their homes and elsewhere. There is no fact shown which would, in any legal sense, amount to an intimidation of the persons who were actually in or who were about to enter the employ of the plaintiff, and no facts show-

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ing acts of the defendants which would, in any legal sense, amount to a coercion of any such persons. There are affidavits showing that some of the defendants have been guilty of intemperate language, and have abused by word certain persons, and among them Arthur Elliott, a constable of the town of Sweden, who has interested himself in behalf of the plaintiff, in the protection, as he calls it, of the new moulders who had come to Brockport.

The opposing affidavits, read in behalf of the defendants, while they do not deny that the defendants have, by persuasion, induced moulders to leave the plaintiff's employ and have, by like means, induced others not to enter it, deny, fully and unequivocally, all imputations of acts of violence or intimidation charged against them in the complaint.

It further appears that the "strike" mentioned in the moving papers, was preceded by an order of the plaintiff reducing the wages or compensation of this class of laborers; also, that the moulders, then and since in the employ of the plaintiff, had not contracted their services to the plaintiff for any length of time, but that on the contrary they were at work by the day or by the piece.

"The orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft, for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such right" is now permitted by statute (*Chapter 19, Laws of 1870*).

This statute does not, however, permit an association or trades union, so-called, or any body of men in the aggregate to do any act which each one of such persons in his individual capacity and acting independently had not a right to do before the act was passed. This act does not shield a person from liability for his action in intimidating or coercing a fellow-laborer so that he shall leave his employer's service. Such conduct is, in its nature, a trespass upon the rights of business of the employer. If he compels, by assault or violence, by threats, by acts of coercion, a fellow-craftsman to leave the employ of

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another, he commits an offense against the rights of such person which is hardly distinguishable from an act which should itself injure or destroy the product of that man's labor. It is a direct injury to property rights, and may be regarded as the sole proximate cause of such injury, for the laborer, in such cases, has not freedom of action, and cannot, himself, be deemed to take any voluntary part in the transaction. For instance, in the case of *Woodward* agt. *Washburn* (3 *Denio*, 369), the action was for the loss of service of one Welcome W. Smith, the plaintiff's hired man, caused by the defendant detaining him in the Bank of Syracuse. The court held that the action was maintainable upon the principle of the common law, that when a person sustains a loss or damage by the wrong of another, he may have an action upon the case to be remunerated in damages.

A distinction has been sought to be made between cases when there was an unexpired time contract, and cases where the services were by the day or by the piece; but I do not think that such distinction rests upon any sound reason, because in cases of piece work or day work, there would remain for the court or the jury to decide whether, in point of fact, the service would have been continued even though it was not provided for by contract, and even though the employer had the right to dismiss the employe and the employe had the right to quit the service of his employer at any time when he saw fit (*Gunter* agt. *Astor*, 4 *J. B. Moore*, 12; *Benton* agt. *Pratt*, 2 *Wend.*, 385). In such a case the injury to the property and business of the employer would not consist so much in breaking the contract which existed, as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be, in each case, a question of fact.

There being in this case, no sufficient evidence of violence, force, intimidation or coercion on the part of the defendants against the plaintiff's laborers, the learned counsel for the plaintiff is forced to and does take the position that a confedera-

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tion of persons to entice away workmen or servants from the plaintiff's employ is an unlawful act, and may be restrained by injunction. The facts before me clearly show a combination of the defendants, and an enticement by them of laborers from the plaintiff's shops, and others who were about to enter the employ of the plaintiff, by means of arguments, persuasion and personal appeals, accompanied by payment of traveling expenses to other localities. If, therefore, the laws of this state permit an injunction to be granted for such a cause, a proper case is made out for it upon this motion.

I assume, without discussing it, that if acts of this description are unlawful and actionable by common-law process, that a confederacy or a joint and concerted action on the part of a number, persistent, continuous and threatening to continue, would be a proper subject of relief in a court of equity, and would be restrained by injunction.

The case of *Lumley agt. Gye* (2 *El. & B.*, 216) holds that an action lies for maliciously procuring a contract to give exclusive personal service for a time certain, equally when the employment has commenced, or is about to be commenced, provided the procurement be during the subsistence of the contract and produce damage; and that to sustain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant.

In that action, the plaintiff had secured the services of Johanna Wagner, an opera singer, to perform in his theater for a certain time, with a condition, amongst others, that she should not sing or use her talents elsewhere during the term, without plaintiff's consent in writing. The defendant, knowing such to be the fact, enticed and procured the opera singer to refuse to perform, and she did not perform or sing for the plaintiff during the term.

CROMPTON, J., says: "Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and breach of a wider rule, or whether it be, as contended by the defendant,

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an anomaly and exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring or keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrong act for which he is responsible at law.

In *Walker agt. Cronin* (107 *Mass.*, 555) it was held that an action of tort may be maintained upon a count which alleges that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully and without justifiable cause, molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will. So, also, the case of *Hart agt. Aldridge*, (*Cowp.*, 54), and *Gunter agt. Astor* (4 *J. B. Moore*, 12).

Many other cases might be cited, but these will suffice to show that elsewhere than in this state, an action may be maintained for enticing from the employment of a party, laborers who are not of a class of domestic servants.

In this state it was held, in the year 1835, in the case of the *People agt. Fisher* (14 *Wend.*, 9) that a conspiracy of journeymen workmen of any trade or handicraft, to raise their wages by entering into combinations to coerce journeymen and master workmen employed in the same trade or business, to conform to rules established by such combination for the purpose of regulating the price of labor, and carrying such rates into effect by over acts, is indictable as a misdemeanor. In that case it appeared that the coercion consisted only of pains and penalties which the defendants had imposed upon one of their number for violating the rules of

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their association, and their refusal to work for a manufacturer who had employed that person contrary to their wishes. That case can no longer be deemed to be the law of this state, since the passage of the act of 1870, already quoted, for the persons there indicted seem to have been guilty only of peaceable co-operation for the purpose of maintaining the rate of wages. Can the effect of this statute be avoided by resorting to the common law-action for enticing away servants? Under the facts shown in this case, whatever may be the proofs when the case comes on for trial, I think the plaintiff is not entitled to an injunction upon that theory.

In *Haight* agt. *Bagley* (15 *Barb.*, 499) it was intimated by the court that the law in regard to enticing a servant may have had its origin in English statutes; and though the court seemed to think that the English cases had not been overruled in this country, yet in the case then in hand, the court was quite careful to put its decision wholly upon the ground that the gravamen of the action was the trespass upon the plaintiff's premises, and that the enticement by words of persuasion was mere matter of aggravation of damages.

The case of *Smith* agt. *Lyke* (15 *Hun*, 204), which was an action to recover damages for enticing away the plaintiff's wife, it was held that the good faith of the defendant was involved, and that if he acted honestly, though mistakenly, there could be no recovery.

As is well known, the origin of this kind of actions was at a time of the substantial enslavement of domestic servants, and at the outset it proceeded upon the theory that such servant had not freedom of action which is conceded to that class at the present day; yet, in one way or another, the doctrine has been extended, as has been shown above, not only in England, but in parts of the United States, to cases which in its inception it did not cover. I am disinclined to extend, by any judgment of mine, the doctrine of recovery for enticing away servants where, both in fact and theory, the person enticed is a free agent to come and go as he will, responsible

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only, like other persons, for the violation of his contract or his duty.

The controversy between capital and labor has been constant, differing only in intensity, from time to time, for at least five centuries in English history. The statute of Edward III, known as the statute of laborers, in the year 1349, was coarse and brutal in its provisions, and was designed to meet coarse and brutalized conditions of society, which followed immediately upon the ravages of the plague. English legislation since then has tended to bring about a better condition of affairs between capital and labor.

The object of many acts passed in the present century was to fix the price of labor, not only beyond the control of the laborer himself, but also beyond the control of the employer; with what measure of success it is not necessary for me here to say. But I apprehend that the course of legislation upon that subject in this state has been wiser, and with a more full and accurate knowledge of the laws of political economy. Indeed, it would seem that the wisest rule of political economy would demand that there should be no legislation upon this subject beyond preserving both employer and employed against violence and breaches of the peace, or acts in the nature of trespass, which have a tendency to bring about breaches of the peace.

The fact that there are vast accumulations of capital directed towards the development of the resources of nature and of trade in this country, having all the advantages of aggregated wealth, would probably, if not certainly, have a tendency to induce laborers also to combine for their own protection. Capital would seek to obtain the cheapest labor, and, unless resisted by something more than the old methods before the breakdown of ancient industrial systems, would almost inevitably succeed in disturbing its relationship to labor, to the detriment of the community. It is, I think, for such reasons that trades unions were organized, and for such reason is it, if at all, that their policy can, on principles of

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political economy, be recognized and sustained. The combination of workingmen undoubtedly permits of more prolonged contests with capital than formerly; but capital, by combination also, threatened to be stronger than before. It is by combination in trades unions that laborers possess and exercise some control over the wages and the hours of labor; and we have the authority of T. E. Cliff-Leslie, professor of jurisprudence and political economy, Queen's University, for saying that "It would be nearer the truth to say that trades unionism tends to prevent disputes with the employer, rather than to make the common allegation that it promotes them."

The fact was shown in evidence before the British royal commission on trades unions, which reported in 1869, that there had been fewer disputes with employers, and greater permanence in the rate of wages, in the trades with the strongest and richest and most extended unions.

Undoubtedly if capitalists and laborers could truly see wherein their welfare respectively lies, it would be found that there was an inter-dependence between them, and that what was for the permanent and substantial good of either would, in the long run, be for the benefit of both. But, in the language of Mr. Goldwin Smith: "The laborer may be forgiven if he fails fully to understand that, though he receives his wages from the hand of the master, his real employer is the community, which will refuse, and cannot possibly be compelled, to give a higher price for the product of his labor than it can afford; that he, as a member of the community and an employer in his turn, offers for every product of labor which he purchases the market price and no more; and that if he persists in acting on the opposite principle where his own work is concerned, instead of enforcing an exceptional privilege, he will ruin his own trade" (30 *Contp. Review*, 531).

Yet, that the controversy will go on admits of no doubt. The direction of capital will be turned by the resistance of labor, and labor be turned by the exactions of capital, for

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both, under a well recognized law of political economy, will run on the lines of the least resistance. It is the duty of courts and of peace officers to see to it that such controversy shall not result in breaches of the peace, or in such acts as may tend to breaches of the peace, and to hold alike the employer and the employed to the payment of damages for any violation of contract, and to responsibility for any acts which immediately and in a legal sense affect the rights of either. Beyond that I am not disposed to go, because that is as far as the case presents judicial questions. Further than this, let the law of supply and demand govern the parties. The field open to either is wide.

The motion for an injunction during the pendency of the action is denied, with ten dollars costs.

SUPREME COURT.

JOHN FALLON agt. CHARLES W. DURANT and others.

Reply — When denial upon information and belief is insufficient — Answer — Complaint — Code of Civil Procedure, sections 493, 514.

A denial by plaintiff in his reply, upon information and belief, of allegations in defendant's answer, is insufficient where the facts set up in the answer are clearly within the plaintiff's knowledge as appears by the averments in his complaint.

Special Term, December, 1880.

DEMURRER to reply.

Norwood & Coggeshall, for demurrer.

Walsh & Eckerson, opposed.

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VAN VORST, J. — The plaintiff's reply is clearly insufficient. The defense in the answer, to which the reply under the order of the court was interposed, sets up facts clearly within the plaintiff's knowledge. He knew when the injury was sustained by himself, for he has clearly stated it in his complaint. By his reply he denies, "upon information and belief, each and every allegation" contained in the answer setting up the new matter. The Code does not authorize a denial in that form.

Section 514, which applies to this pleading, provides a form of denial. It must contain "a general or specific denial of each material allegation controverted," or "of any knowledge or information thereof sufficient to form a belief" (*Code Civil Procedure, sec. 493*).

The plaintiff in his reply fails wholly to meet the requirements of the Code in his denial.

I do not mean to decide that a party cannot deny allegations contained in a pleading upon information and belief. There are cases when such method of denial would be highly proper. But when, as is manifest in this case from the allegations contained in his complaint, which forms a part of the record before me, he attempts to deny upon information and belief facts within his knowledge, such denial must in law be regarded as insufficient.

The question could, without doubt, have been raised by a motion to strike out the pleading, but the objection may also be taken by demurrer.

There must be judgment for the defendant on the demurrer, with liberty to the plaintiff to amend on payment of costs.

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SUPREME COURT.

J. TINKEY agt. C. A. LANGDON.

Practice—Supplementary proceedings—Jurisdiction and power of county judge as to appointment of receiver in—Appeal—Irregularities which are waived by—Contempt—Basis for imposition of fine.

On a motion to set aside an order made by a county judge appointing a receiver in supplementary proceedings where it appeared that an appeal was taken to the general term of this court, which appeal is still pending:

Held, that such appeal must be deemed to be a waiver of such irregularities if any there be, as are not brought up by it for review, and as to all such alleged irregularities and improper acts of the county judge as are covered by the appeal, they will be considered when the appeal shall be heard at general term. All action proper to be taken at special term, either to vacate it or correct it, should be taken before the bringing of the appeal from it to the general term.

Where an order was made by a county judge declaring a judgment-debtor in contempt, the order being made on the return of an order to show cause, the same having been duly served on the debtor, but without his presence and without the appearance of anyone in his behalf:

Held, that it being taken against the debtor by default it was competent for him to move to set it aside for irregularity. The moving party was bound to make a case for the granting of the order on the merits, at least, the same as if the debtor had appeared and objected to the proceeding; and if he failed to make his case the debtor might and should move to set the order aside rather than to appeal.

Can an appeal be taken from an order obtained by default for non-appearance? *Quære.*

Although a county judge may, under section 298 of the Code of Procedure, appoint a receiver in supplementary proceedings, *it seems* doubtful whether he is authorized by law to order a conveyance by the debtor of his property to a receiver or to direct its delivery and possession to that officer,

To punish as for a contempt for refusing to deliver property to a receiver, an order requiring such delivery is a necessary prerequisite. A simple demand of possession is not sufficient.

Where the order appointing the receiver directed the debtor to assign and convey his lands and real estate, but contained no directions to the debtor to surrender its possession:

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Held, that he could not be held in contempt for omitting or refusing to do what had not been commanded or required of him.

In contempt proceedings a fine cannot be properly imposed arbitrarily and capriciously; but it must have a basis upon proof of damages or injury.

Saratoga Special Term, August, 1880.

BOOKES, *J.* — Two motions were made in this cause — one to set aside an order made by the county judge of Washington county appointing a receiver of the property of Langdon in proceedings supplementary to execution based on a judgment rendered in the supreme court, the other to set aside an order to show cause why Langdon should not be punished for contempt, and, also, the order made on its return with all proceedings thereon, which latter order declared said Langdon in contempt for refusing to convey his real property to the receiver, and for refusing to deliver to the latter possession of both his real and personal property, and by which latter order a fine for the alleged contempt was imposed upon him of \$450, with thirty dollars costs of the proceedings.

These motions were heard together substantially as one motion.

As to the order appointing a receiver it appears that an appeal was taken thereon to the general term of this court, which appeal is still pending.

This appeal must be deemed to be a waiver of such irregularities, if any there be, as are not brought up by it for review; and as to all such alleged irregularities and improper acts of the county judge as are covered by the appeal, they will be considered when the appeal shall be heard at general term. All action proper to be taken at special term, either to vacate it or correct it, should be taken before the bringing of the appeal from it to the general term. The motion to set aside the order appointing a receiver must be denied.

The important question here to be decided, as I think, relates to the granting of this order by the county judge

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declaring Langdon in contempt for the cause recited in the order, and imposing a fine of \$450 therefor, with thirty dollars costs and expenses of the proceeding.

This order was made on the return of an order to show cause, the same having been duly served on the debtor, but without his presence and without the appearance of anyone in his behalf. It was taken against the debtor by default. This being so it was competent for him to move to set it aside for irregularity.

The moving party was bound to make a case for the granting of the order on the merits at least, the same as if the debtor had appeared and objected to the proceeding; and if he failed to make his case the debtor might and should move to set the order aside rather than to appeal, if, indeed, he could appeal from an order obtained by default for non-appearance.

It must be borne in mind that the order was not granted because of the violation of an injunction, or restraining order made in proceedings supplementary to execution, but for refusing to convey real property to the receiver, and for refusing to deliver possession of real and personal property to that officer. Such was the alleged ground of offense, and no other.

First. There is a serious question whether the county judge had any power to order the conveyance and delivery of the property by the debtor. He might appoint a receiver (*Code, sec. 298*), but had he any authority to direct the conveyance and delivery of the debtor's property to the receiver?

If he may do this the right and power must be found in some statute, as he is confined to the exercise of statutory authority. This right and power rests in *the court* as an original inherent power, and there need be no statute expressly conferring it. By virtue of this inherent power *the court* may order the debtor to make conveyance and delivery of his property to the receiver, and may, by proceeding for contempt, compel obedience to such order. The cases are numerous wherein this power has been exercised by *the court*. But

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does the county judge who derives his authority from the statute possess like power with the court as regards the subject in hand?

It is said, in *Pool agt. Safford* (14 Hun, 369), "a judge can appoint a receiver because the statute gives the power (*Code, sec. 298*), but with the appointment his authority over the matter ends." I find, on examination of the cases, that the decisions are not entirely harmonious on this question, as to the power of a county judge in a case like the present; and, inasmuch as I am of the opinion that the order must be set aside on other grounds, this question will be left to be determined when a case is presented which must turn on its proper disposition. Besides, it seems probable that the question whether the county judge is authorized by law to order a conveyance by the debtor of his property to a receiver, or to direct its delivery and possession to that officer, whether this power does not inhere in the court alone, will be up on the appeal from the order appointing the receiver in this case.

Therefore I deem it better to leave it for consideration at that time.*

Second. The debtor was held in contempt for refusing "to surrender the possession of his lands and real estate, or any part thereof, to said receiver," possession having been demanded of him.

This was one of the grounds of alleged contempt. But he has not been ordered so to do, as I can learn from the papers submitted on this motion.

The order appointing the receiver, directed the debtor to assign and convey his lands and real estate, but it contained no direction to the debtor to surrender its possession.

He could not be held in contempt for omitting or for refusing to do what had not been commanded or required of him. It was said in *Watson agt. Fitzsimmons* (15 Duer, 629-631) "in refusing to deliver his property to the receiver he (the debtor)

*The appeal was dismissed on a technical point, hence this question was not examined at general term.

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has not disobeyed any order of the court, for none has been made requiring him so to deliver it. He refused to do that which it was his duty to do, but that was a duty resulting from a change of title to the property, produced by the appointment of a receiver, and not from an order which he had refused to obey. To punish as for a contempt for refusing to deliver property to a receiver, an order requiring such delivery is a necessary prerequisite."

Third. The above remarks under the last point, with the authority there cited, apply also to that part of the order which declares the debtor in contempt for refusing "to deliver possession of his personal property." The order appointing the receiver contained no such requirement.

Fourth. A fine was imposed of \$450, with thirty dollars costs, and expenses of the proceedings. Before a fine exceeding \$250 could be properly imposed, an inquiry should have been made in regard to the amount of damages caused to the complaining party by reason of the debtor's alleged misconduct. A fine cannot be properly imposed arbitrarily and capriciously, but it must have a basis upon proof of damages or injury (*Simmonds* agt. *Simmonds*, 6 *Weekly Dig.*, 263; *Ludlow* agt. *Knox*, 7 *Abb. [N. S.]*, 412; *Clarke* agt. *Benninger*, 75 *N. Y.*, 344). No inquiry was made before the county judge on granting the order, as to this amount of damages caused by the debtor's alleged misconduct. The order was granted, as the county judge states (*fol.* 19, 20), "solely on the proofs contained in the within papers," to-wit: The motion papers before him, referred to in his order to show cause, and I find nothing in them showing damages or injury caused by the alleged misconduct of the debtor to the amount of \$450, or, indeed, to any appreciable amount whatever. The imposition of the fine of \$450 seems to be without proof in its support. Nor can this objection to the order of the county judge be overcome by proof now submitted, on this motion to set that order aside.

Other objections besides those above considered were

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argued before me on the motion, which, in view of the conclusions above reached, it is unnecessary to examine.

The order of the county judge, adjudging the judgment debtor guilty of contempt, and imposing a fine of \$450 therefor, with thirty dollars costs and expenses of the proceedings against him, must be vacated and set aside.

No costs of motion should be allowed to either party, inasmuch as one motion is denied and the other granted.

SUPREME COURT.

THE HEBRON SOCIETY, &C., agt. SAMUEL SCHOEN and others.

The mortgagor of mortgaged premises, who died seized thereof, left by will a legacy to his daughter Cecelia, not making it a charge upon the real estate. He left sufficient personal property to pay the legacies, and bequeathed the "remainder," including the real estate, to his sons. *Held*, that Cecelia has no interest in the mortgaged premises, and was therefore not a necessary party to this action to foreclose the mortgage. *Held*, that the fact that the executors have wasted the personal property, and have neglected to pay the legacy, cannot charge the real estate with such payment.

Special Term, October, 1880.

MOTION to set aside sale made under a decree of foreclosure, and to release the purchaser upon the ground that the defendant Cecelia Schoen, a daughter of the mortgagor, being an infant, had not been served with a copy of the summons, and had appeared in the action, not by a guardian *ad litem*, but by attorney.

M. S. Thompson, for motion.

Max Moses, opposed.

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VAN VORST, J. — An examination of the papers upon this motion leads me to the conclusion, in opposition to the contention of the counsel for the purchaser at the sale under the judgment of foreclosure, that Cecelia Schoen has no interest in the mortgaged premises, and was, therefore, not a necessary party to the action, and the failure to bring her in properly, is of no moment.

The mortgagor, who died seized of the mortgaged premises, subject to the mortgage, by his last will and testament made certain pecuniary bequests, among which was one to his daughter Cecelia Schoen of \$2,000. It is supposed by the counsel appearing for this motion, that the legacy to Cecelia was made a charge upon the testator's real estate. The will does not in terms so charge the realty, and I do not find from an examination thereof that any implication arises of such intention.

The pecuniary legacies are in the first instance payable out of the personal estate (*Manson agt. Manson*, 8 *Abbt. N. C.*, 123, and cases there cited).

The moving papers do not show that there was any deficiency of personal assets to pay the legacies in full, and, on the other hand, the affidavits in opposition do state that the testator left sufficient personal property to pay the legacies.

That, it appears to me, disposes of the question and rebuts any presumption that the testator meant to burden the real estate with the payment of legacies.

It is charged, however, that the executors have wasted the personal property and have neglected to pay the legacy in question. But such fact cannot charge the real estate with the payment of this bequest. The real estate passes, by a clause in the will, to the testator's sons.

It is true that the gift to the sons is of the "remainder" of all the testator's estate, real and personal, and if the fact had been that there was not personal property sufficient to pay the legacy the question might, perhaps, have arisen (*Kalbfeish agt. Kalbfeish*, 67 *N. Y.*, 354). But, under the facts above

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stated, it is not perceived that Cecelia Schoen has any claim to subject the realty to the payment of her legacy.

If the executors have wasted the personal estate, her claim is against them. The motion is denied, with costs, and the purchaser must complete his purchase.

SUPREME COURT.

LORENZO CASE AND EDWARD E. CASE, appellants, agt. JAMES OSBORN, respondent.

Interest — In action for work and labor done and materials furnished, from what time interest to be allowed — Is demand necessary to entitle plaintiff to interest from time of completion and acceptance of job.

In an action for work and labor done and materials furnished where the facts as proved were that no time was fixed under the agreement with plaintiff when the job was to be completed — that the job was completed and accepted by the defendant September 9, 1874:

Held, that the bringing of suit was sufficient demand and plaintiffs were entitled to interest from that time at least.

On the above facts found was any demand necessary to entitle the plaintiffs to interest on the amount of the recovery from the time the job was completed and accepted by defendant? *Quære.*

Fourth Department, General Term, January, 1880.

THIS action was brought to recover for work and labor done and for materials furnished by the plaintiffs, who were copartners and doing business in the city of Watertown as carpenters and general house-joiners, in repairing a dwelling-house for the defendant. The case was referred to one E. C. Emerson, as referee, and tried before him. In his report the referee found as facts: That the work was all done and materials furnished September 9, 1874, and that on the same day the defendant duly accepted said work and materials in accord-

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ance with the terms of the contract. The referee also found that there was due the plaintiffs on that day, over and above all set-offs and counter-claims, the sum of forty seven dollars and sixty-six cents, and ordered judgment for plaintiffs and against defendant for that amount. The referee also found that there was no demand made by plaintiffs for this amount, before bringing the action; that the claim was unliquidated; that as matter of law plaintiffs were not entitled to interest.

Anson B. Moore, attorney for appellants.

I. The referee finds as facts: 1. There was no time fixed under the agreement with plaintiff, when the job was to be completed. 2. That the job was completed and accepted by the defendant September 9, 1874. On the facts found by the referee no demand was necessary. The money was due when the job was completed and accepted; and the plaintiffs were entitled to interest on the amount found due them from that day, September 9, 1874 (*Freter* agt. *Heath*, 11 *Wend.*, 479; *Sill* agt. *Hall*, 20 *Wend.*, 51; *Gillet* agt. *Van Rensselaer*, 15 *N. Y. R.*, 397; 2 *Com.*, 134; 20 *N. Y. R.*, 463-469; 8 *Barb.*, 327-331). (a) For refusing to allow interest to the plaintiffs on the amount, forty-seven dollars and sixty-six cents, found their due on September 9, 1874, the judgment should be reversed.

II. If a demand was necessary before bringing the action to entitle the plaintiffs to interest, clearly the bringing of the action was a sufficient demand.

Allowing the interest on plaintiffs' claim from the commencement of the action to the time of filing the referee's report, would increase the damages to fifty-two dollars and eighty-six cents, and plaintiffs would recover the full costs of the action. The refusal of the referee to thus hold and decide is error for which the judgment should be reversed.

III. The referee erred in holding that no demand was made before bringing the action. The plaintiff swore to a demand, and this fact was not denied or disputed by any witness on

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the trial, yet the referee rejected this evidence and found that no demand was made.

Porter & Watts, attorneys for respondent.

I. The appellants ask for a reversal of the judgment in this case, on the sole ground that the referee erred in refusing to allow interest on their claim from the date of the completion and acceptance of the work, September 9, 1874.

The plaintiffs are not entitled to interest upon the amount of their recovery for any time, prior to the report and decision of the referee. The referee so decided, and upon every principle of equity, as well as upon the law and facts in this case, the referee is right (*Gallop agt. Perue*, 10 *Hun*, 525; 6 *Cowen*, 193; 4 *Cowen*, 496; 3 *Cowen*, 393-425; 5 *Cowen*, 588; 45 *Barb.*, 40; 61 *Barb.*, 180; 4 *Barb.*, 36; 20 *Wend.*, 52; 17 *Barb.*, 454; 3 *Johns. Ch.*, 587; 12 *Johns.*, 156; 7 *Wend.*, 178; 12 *Abb. [N. S.]*, 240; 3 *Hun*, 218; 20 *N. Y.*, 463; 45 *N. Y.*, 306; 60 *N. Y.*, 106). 1. The amount due plaintiffs was unliquidated and unsettled. No demand of payment had been made by plaintiffs of defendant, and the referee so finds. The referee also finds that no time of payment was agreed upon by the parties. 2. Interest is simply damages, and when allowed it is only as damages. It is submitted that the allowance of interest in any case is largely discretionary with the court or referee before whom the same is tried, and is to be determined upon the facts in each particular case, and such determination should not be disturbed unless there has been gross injustice done.

SMITH, J. — Appeal from a judgment entered on the report of a referee. Action for work and labor. The referee found in plaintiffs' favor for forty-seven dollars and sixty-six cents, but denied them interest on the ground that no demand was made before suit. We think he erred in not allowing interest. Plaintiff testified that he called on defendant about six weeks after the work was completed and defendant said, in sub-

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stance, he would pay it when he got ready. Saw him once after that and told him he must come to plaintiffs' shop and settle the matter, and he made no answer. This testimony is not disputed. Besides, it is proved that the work was completed and accepted in September, 1874. Further, bringing suit was sufficient demand, and plaintiffs' were entitled to interest from that time at least.

Judgment reversed and new trial ordered before another referee, costs to abide event.

MULLIN, P. J., and TALCOTT, J., concur.

N. Y. COMMON PLEAS.

TROW'S PRINTING AND BOOKBINDING COMPANY agt. JAMES W. HART.

Attachment—Purchaser of attached property may move to vacate—where motion is made upon the papers on which warrant is granted, plaintiff cannot put in additional affidavits in support of attachment—An affidavit is insufficient which fails to state that plaintiff is entitled to recover the sum stated over and above all counter-claims known to him—Code of Civil Procedure, sections 636-682).

A purchaser, from a defendant in an action, of certain property against which an attachment has been issued, may, under section 682 of the Code of Civil Procedure, move to vacate the attachment.

The attachment was properly vacated, on the ground that the affidavit did not show that the plaintiff was entitled to recover a sum stated therein over and above all counter-claims known to him (*Code of Civil Procedure, sec 636*).

Where the motion to vacate the attachment is made upon the papers on which the warrant is granted, the plaintiff cannot put in additional affidavits in support of the attachment.

General Term, December, 1880.

APPEAL by plaintiff from order of special term of February 11, 1880, vacating attachment issued August 23, 1878,

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against the defendant's property in this action, under section 636 of the Code.

The motion to vacate the attachment was made by Nelson Sherwood, a purchaser from defendant of certain real estate, subject to the lien of the attachment.

J. F. DALY, *J.* — Any person who has acquired a lien upon or interest in the defendant's property after it was attached may, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative. Such are the broad provisions of section 682 of the Code, and they are broad enough to include purchasers, assignees and other transferees of the attached property among those who may apply to vacate the attachment. A subsequent attaching or execution creditor may be described as a person who has acquired a lien, and so may a subsequent mortgagor; but the section enumerates, also, the persons who may have acquired an interest in the property, and the intention to extend the benefits of the provision to others besides attaching and judgment creditors of the judgment debtor is manifest. Any arguments based upon the inconvenience to the plaintiff arising from a multitude of motions on the part of different purchasers of portions of the attached property can have no weight against a plain statutory provision. The section under consideration (682) has received no interpretation from the courts as yet, in so far as the point above discussed is concerned. Judge ANDREWS, in *Steuben County Bank agt. Alberger* (56 How., 245), speaks of this section as extending to persons having liens on the attached property acquired subsequent to the attachment, the remedy was formerly confined to the defendant, to have the attachment vacated on motion, and speaks of the section providing that the defendant, or a lienor, * * * may apply, and makes no mention

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of purchasers or assignees having the right. But the point in question was not under consideration. The moving party in that case was a judgment creditor of the defendant in attachment.

As to the next point raised by appellant, it seems clear that a purchaser of a portion of the attached property has acquired an interest in the attached property. There seems to be no ground for holding that the interest mentioned in the section must embrace all the property attached. Respondent on this question refers us to the *Royal Insurance Co. agt. Noble* (5 Abb. [N. S.], 54), but that case determines only that an application by the defendant to procure the discharge of the attachment by giving security must be made as to all the attached property; that he cannot choose what portion he will release and give security for that portion only (*old Code*, sec. 240, 241). The case has no application to a purchaser from the judgment debtor moving to vacate the attachment. The new Code (*section* 687) it may be said, passing, now permits defendant to obtain the discharge of the attachment as to a portion of the attached property on giving an undertaking.

The third point taken on the appeal is that the judge, at special term, should have received the additional affidavits in support of the attachment, which plaintiff offered in answer to the motion. The motion was made on the affidavit on which the attachment was granted "and all the papers filed and served in said attachment proceedings in the above action." This confined the papers to those used to obtain the warrant. Appellant argues that it embraced all the papers in the judgment roll.

The notice, however, distinguishes between the papers in the action and those in the attachment proceedings. The Code (*section* 636) provides what must be shown to obtain the warrant. An affidavit and an undertaking are essential; nothing more. The motion was not made on the complaint nor on the testimony taken on the application for judgment.

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The case of *Ives agt. Holden* (14 *Hun*, 402) is clearly distinguishable from this, because the motion there was made on the complaint as well as the affidavit for attachment. As the motion was made upon the papers on which the warrant was granted, the plaintiff could not put in additional affidavits in support of the attachment (*Code, section 683; Steuben County Bank agt. Alberger*, 56 *How.*, 245).

As to the sufficiency of the affidavit upon which the attachment was granted, the decisions are conflicting on the question whether the want of venue makes the affidavit a nullity (*Barnard agt. Darling*, 1 *Barb. Ch.*, 218; *Cook agt. Staats*, 18 *Barb. R.*, 407); but the absence of an indispensable allegation makes the affidavit defective. The *Code* (*section 636*) provides that the affidavit must show that the plaintiff is entitled to recover a sum stated therein over and above all counter-claims known to him. This is a wholesome provision, and, as the statute must be strictly observed, the allegation in the precise form, or in substance, is as necessary as the statement of a cause of action or of the grounds on which the attachment is applied for. This view has been taken by the Supreme Court (*Lyon agt. Blakesly*, 19 *Hun*, 299, *General T., Second Department*, 1879). The allegation in question is not found in the affidavit of Edward Lange, on which the attachment was issued, and the attachment was properly vacated.

The order should be affirmed, with costs.

DALY, C. J., and VAN HOESEN, J., concur.

Matter of Pray.

SUPREME COURT.

In the Matter of PRAY.

Habeas corpus — custody of children.

In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An inquiry as to the father's illtreatment of his wife is pertinent as bearing upon the father's right to take the children from their mother.

New York Chambers, January, 1881.

THIS is a proceeding by *habeas corpus*. Upon the return to the writ the matter was referred for the taking of evidence. The referee was directed to report thereon with his opinion. The object of the proceeding was to determine the father's right to the control of his two children, who were with the mother. The motion was to confirm the report of the referee, who had decided in favor of the father. The parents were living separate and apart.

S. V. R. Cooper, for motion.

Roger A. Prior, opposed.

VAN VORST, *J.* — I cannot accept the conclusion, under the facts and circumstances of this case, as they appear by the papers, in so far as they are conceded, that the father is absolutely entitled to take to himself the control of the persons of these two children — the one a daughter, aged six years, and the other a son, aged five years.

It is obvious that these children are of an age to require a mother's care and training, and, if there is no objection to her personally, I am of opinion that it would be for the true inter-

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est of the children that they should secure such care and training at her hands.

The referee is of opinion that under the facts both parents are irreproachable. If that be so, it might well be urged that as far as the welfare of the children is concerned, and which is the matter, considering their tender years, which is to be now chiefly considered, it would be best to leave them with their mother. But a question arose before the referee which I apprehend bears upon the father's right to take from their mother the personal control of the children.

The return of the respondent to the writ of *habeas corpus* charges the relator with repeated acts of brutality towards her without any justifying cause, if a cause for such conduct could in any case be supposed to exist. The relator was asked the question, "Did you ever strike your wife?" This question was objected to as "irrelevant and as not bearing on the question as to his fitness for the custody of the children." The objection was sustained and the testimony was excluded.

This ruling, I think was erroneous. The question was, without doubt, asked to sustain the charges in that regard contained in the return to the writ of *habeas corpus*. The inquiry was proper, and bears upon the question of the fitness and propriety of taking these children from a mother pronounced by the referee to be irreproachable. I am not prepared to hold that inquiry as to the conduct of a husband toward his wife, does not bear upon the question as to whether, when they are living in a state of separation, he should take from her the children of the marriage so young as these are found to be. For I must conclude that as a man is to his wife in this regard, so he would be towards his children.

As an inquiry into the husband's acts and conduct in this regard will bear in the end upon the question in issue, the referee's report cannot be confirmed, but the report should be sent back for further testimony.

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SUPREME COURT.

FANNIE McCORMACK, as executrix, and another, agt. FANNIE McCORMACK and others.

Will—Trust estate created by will which provides for accumulations for benefit of adults as well as minors is void—Effect where annuity to widow is also charged upon real estate—after-born child.

Though where a trust estate created by will provides for accumulations for the benefit of adults as well as minors, it is void under the provisions of the Revised Statutes—yet, where an annuity to the widow, provided for under this trust estate is also charged upon the real estate, that survives the failure of the trust.

Such annuity, however, is subject to a proportional deduction in favor of an after-born child, who takes as if the father died intestate.

Special Term, November, 1880.

Henry E. Knox, for plaintiff.

Richard E. Knox, for adult defendants.

R. Clarence Dorsett, guardian *ad litem* for infant defendants.

LAWRENCE, J.—It is conceded by all the counsel in this case that the third subdivision of the testator's will, in respect to the accumulation of the rents, profits and income of his estate, is in violation of the provisions of the Revised Statutes, for the reason that the accumulation is for the benefit of adults as well as minors. In that conclusion I fully concur (*See 2 R. S.*, 1103, *sec.* 37, *6th ed.*; *2. R. S.*, 1167, *sec.* 3, *6th ed.*; *Mason agt. Jones*, 2 *Barb.*, 230; *Boynton agt. Hoyt*, 1 *Denio*, 53; *Kilpatrick agt. Johnson*, 15 *N. Y.*, 326).

I have also concluded, although with some hesitation, that the provisions in favor of the widow, in lieu of dower, can be upheld notwithstanding the invalidity of the third clause of

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the will. In the first part of his will, the testator, after giving to his wife the dwelling-house therein mentioned, with certain personal property, declares that he gives to her an annuity of \$8,000, to be paid to her in equal quarter yearly payments of \$2,000 each during her natural life, the first payment to be made in three months after my death, "and I hereby make the said annuity a charge on my real estate." In the third clause of the will, he gives, devises and bequeaths "all my property of every kind (not hereinbefore given to my wife) to my said trustees, and to the survivors and survivor of them, in trust, to receive the rents, profits and income thereof, during the lifetime of my wife, and until my youngest child shall have arrived at the age of twenty-one years, and to pay and apply the said rents, profits and income as follows :

"*First.* To pay the annuity herein-above given to my wife."

"*Secondly.* To pay to each of my children when they shall respectively arrive at the age of twenty-one years, the sum of twenty thousand dollars."

"*Thirdly.* When my youngest child shall arrive at the age of twenty-one years, I direct my said trustees and the survivors and survivor of them, to pay and transfer to each of my six children, before named, the one equal sixth part of the property then held in trust, including any accumulations, except that in case my wife shall then be living, my said trustees shall then retain in their hands sufficient of the estate to enable them to provide for the said annuity for my wife, and the portion so retained shall be by them divided and paid to my children in equal shares at the death of my wife."

The testator then gives to his executors a power of sale, and declares that in case the income from his estate shall not be sufficient to pay the annuity and the other sums directed to be paid, the trustees are authorized to use so much of the capital as may be necessary for that purpose.

At the time the will was executed, as the evidence shows, the testator valued his estate at between \$1,000,000 and \$1,100,000. At his death it was valued at about \$240,000.

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This depreciation in value was evidently not within the testator's contemplation. His supposition seems to have been that the income from the estate in the hands of his trustees would be sufficient not only to defray the annuity given to his wife, but also to pay the legacies bequeathed to his children.

The last clause of the will appears to me to have been inserted by the testator for the purpose of enabling the trustees to meet a temporary, not a permanent deficiency in the income from his estate. However that may be, I am of the opinion, taking all the provisions of the will into consideration, that the primary intention of the testator was to give to his wife, in lieu of her dower, the dwelling-house and personal property mentioned in the will, and an annuity of \$8,000. And for the purpose of avoiding any misapprehension on this point, he made the annuity a charge on his lands. It is true that the scheme which he adopted to produce a sum sufficient to meet the annuity has failed, for the reason hereinbefore stated. Should the annuity therefore fail, the testator having distinctly declared, in addition to the provision for raising it by the accumulation of the rents, profits and income of the estate, that it should be a charge upon his lands? I think not. In *Hone* agt. *Van Schaick* (7 *Paige*, 221) the testator devised and bequeathed to his wife the use of his mansion-house for life, together with his furniture, books, plate, &c., and an annuity of \$3,600, in lieu of dower, and then he devised and bequeathed all his estate, real and personal, to his executors, in trust, for the purposes of his will, and upon certain trusts, which the chancellor held to be void. But the devise and bequest to the widow were partially upheld on the ground that they were not connected with the illegal trusts and limitations of the will. It was held by the court of appeals in *Knox* agt. *Jones* (47 *N. Y.*, 398) that a void trust, which is separable from other valid trusts, may be cut off when the trust thus defeated is independent of the other dispositions of the will and subordinate to them and not an essen-

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tial part of the general scheme (*See, also, Manice agt. Manice, 43 N. Y., 303*).

In the case at bar, I do not think that the scheme for raising the amount necessary to pay the annuity is so intimately connected with the gift of the annuity itself that the latter cannot stand when the former fails. The widow will therefore be entitled to elect between her dower rights and the provisions of the will made in lieu thereof.

By the birth of the child, Ethel H., after the execution of the will, the testator, in my opinion, died intestate as to one-seventh of his estate (*Sandford agt. Sandford, 4 Hun, 753; 3 R. S., p. 64, sec. 47*).

The infant, therefore, inherited one-seventh of the testator's estate, subject to her mother's right of dower therein, and the annuity of the mother should, I think, abate one-seventh, and she should have her dower in the one-seventh of the real estate which descends to the infant (*Mitchell agt. Blaine, 5 Paige, 388; Sandford agt. Sandford, 4 Hun, 753*).

To recapitulate, I am of the opinion that all of the provisions of the third subdivision of the will are void for the reason above stated; that the provisions made in favor of the widow in lieu of dower are valid, and that she is entitled to elect between those provisions and her dower; that the child, Ethel H., is entitled to the same share of his estate as she would have received if he had died intestate; that, except so far as the will has been hereinbefore declared to be valid, the testator died intestate.

Decreed accordingly.

Findings may be settled on two days' notice.

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SUPREME COURT.

ABIGAL ROBLIN agt. NELSON LONG.

Answer — when sham or frivolous — Practice as to — Action to enforce a foreign judgment — When answer to be deemed sham and frivolous — Jurisdiction of the court to compel a defendant to convey lands which are beyond its jurisdiction — Code of Civil Procedure, section 537.

Under section 247 of the Code of Procedure, where “a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly.” This practice is not changed, but remains the same under section 537 of the Code of Civil Procedure.

In an action brought in the courts of this state to enforce the judgment and decrees of the courts of a foreign state or country, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint will be stricken out as sham where the defendant appeared in the original action.

The law is well settled in this country that courts of justice in one state will, out of comity, enforce the laws of another state or country when, by such enforcement, they will not violate their own laws or inflict injury upon some one of their own citizens.

This court having acquired jurisdiction of the person of the defendant, it possesses full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint, though the same are situated in the Province of Canada and without the jurisdiction of this court.

Jefferson Special Term, December, 1880.

THIS action was brought to enforce a judgment and decree of the court of chancery of the Province of Ontario and Dominion of Canada. The original action was commenced to compel the defendant to deliver to plaintiff the patent of certain lands situate in Shannonville in said province. The complaint in this action contained a certified copy of the decree of the foreign court of chancery, one of the provisions of which was, that the “defendant do *forthwith deliver* to the

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plaintiff the patent of the lands and premises mentioned and described in the complaint, and that said defendant do forthwith pay to the plaintiff the costs of the action, taxed by the registrar at \$195.95." The defendant appeared in the foreign court and contested the plaintiff's right to maintain the action, and a judgment was recovered against him on the merits. The defendant left Canada and came to this state without complying with the terms of said decree.

This action was commenced by the personal service of a summons and complaint in this state. The defendant appeared and answered:

1. "Defendant denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint."

2. "The defendant denies, on his information and belief, that the supreme court of the state of New York has jurisdiction to enforce the decree or judgment of the court of chancery of the Province of Ontario, of or concerning real estate, situate in the said Province of Ontario, or of any action founded upon the judgment or decree of said court concerning real estate situate in said province."

The plaintiff moved, upon the pleadings and upon an exemplified copy of the foreign judgment, that the defendant's answer herein be stricken out as *sham* and *frivolous*, and that she have judgment for the relief demanded in the complaint, with ten dollars costs of the motion, and for such other relief as the court might deem proper to grant.

Anson B. Moore, for plaintiff.

I. The answer in this case is manifestly sham and frivolous and should be stricken out, and judgment ordered for the plaintiff for the relief demanded in the complaint. The moving papers show, and it is indisputable that defendant appeared in the foreign court of chancery by attorney; that a trial was had on the merits, and judgment passed against him. In an action on such a judgment the adjudication of

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the foreign court is conclusive and bars a defense in this state (*Lazier* agt. *Wescott*, 26 *N. Y. R.*, 146; *Kerr* agt. *Kerr*, 41 *N. Y. R.*, 272).

II. The first count in the answer is bad. The rule is well settled in this state, that where an action is brought to enforce a foreign judgment or decree, and defendant's answer is a general denial "on information and belief" merely, the same will be stricken out, on motion, as sham and frivolous (*Beebee* agt. *Marvin*, 17 *Abb.*, 194; *Richardson* agt. *Wilton*, 4 *Sandf.*, 708).

III. The courts of this state possess full power and authority to enforce the judgments and decrees of the courts of foreign states and countries. By comity of nations, where jurisdiction is obtained of the person of defendant, this rule will be enforced to the extent of compelling defendant to convey lands which are beyond and not within the jurisdiction of this court. "When the defendant in the action is liable to the plaintiff, either in consequence of contract, or as trustee, or as holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry and may even constitute the essential point on which the case depends, does not seem sufficient to arrest jurisdiction" (*Masie* agt. *Watts*, 6 *Cranch*, 148). In *McDowell* agt. *Read* (3 *Louisiana Annual R.*, 391) the supreme court of that state held, that where a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person to do justice relative to a subject-matter beyond its jurisdiction, though lands be affected by the decree (*Gardner* agt. *Ogden*, 22 *N. Y. R.*, 327; *Dobson* agt. *Pearce*, 12 *N. Y. R.*, 156; *Earl of Derby* agt. *Duke of Athol*, 1 *Ves. Sr.*, 202; *Lord Baltimore* agt. *William Penn*, 1 *Ves. Sr.*, 444; *Lord Cranstown* agt. *Johnson*, 3 *Ves. Jr.*, 170). The second count of the answer is clearly sham and frivolous and should be stricken out or overruled, and judgment ordered accordingly (*Old Code*, sec. 247; *Code Civ. Pro.*, sec. 537).

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Watson M. Rogers, for defendant.

I. The answer sets up two defenses: (1.) A denial of any knowledge or information sufficient to form a belief as to all the allegations of the complaint. (2.) An allegation that the matter in suit pertains to real estate situate in the Dominion of Canada, of which the supreme court of this state has no jurisdiction. (1.) "The court has no power to strike out as sham an answer consisting of a general denial of the material allegations of the complaint" (45 *N. Y.*, 281); nor one which denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint (*Grocers' Bank* agt. *O'Rourke*, 6 *Hun.*, 18). Each form of the denial is expressly authorized by the Code (*Code*, sec. 500, sub. 1; *Steele* agt. *Burk*, 5 *Abb. N. C.*, 88; *Metzey* agt. *Burwell*, 5 *Abb. N. C.*, 90). An answer putting in issue any allegation is not "sham" (14 *Barb.*, 393). (2.) The second answer is neither sham or frivolous. It alleges want of jurisdiction in the courts of this state to enforce the decree of a foreign court, with reference to real estate situate in a foreign country. "A frivolous answer is one so clearly and palpably bad as to require no argument or illustration to show its character, and which would be pronounced frivolous and indicative of bad faith in the pleader, "upon a bare inspection" (*Per ALLEN, J.*, 53 *N. Y.*, 499; *Strong* agt. *Spol and others*, 12 *How. Pr.*, 544). It has been held by the court of appeals that the courts of this state have no power to entertain an action for the conversion of telegraph poles (held to be real property) in the state of New Jersey (10 *Weekly Dig.*, 113). "It is true that foreign courts may decree the performance of contracts relating to land, without their jurisdiction" (*Dilken* agt. *Watkins*, 3 *Sandf. Chan. R.*, 185), "but such a decree can only be enforced against the person of the defendant in the foreign court of the state where the property is situated" (*Davis* agt. *Headly*, 22 *N. J. Eq.*, 115, cited in 4 *Wait's A. and D.*, 191). The complaint in this case prays that a decree of a Canada court, of and concerning real property situate in

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that country, be enforced against the person of the defendant here. It certainly is a debatable question whether that can be done, and where it becomes debatable the answer is not "frivolous."

II. The motion is an entire one, and if one defense is good the motion will be denied (53 *N. Y.*, 497, *supra*).

III. The motion must stand or fall on the pleadings alone (*Cornwall agt. Burke*, 14 *Barb.*, 393). (a) Though the motion purports to be founded on a judgment record, no copy has been served and it cannot be considered here (6 *How.*, 182).

MULLIN, *J.* — Plaintiff moves for judgment in this case on the ground that defendant's answer is sham and frivolous. This practice was permissible under section 247, Code of Procedure. That section provides, that where "a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly."

This practice is not changed, but remains the same under section 537 of the Code of Civil Procedure as under section 247 of the old Code.

This action is brought to enforce the judgment and decree of the court of chancery of the Province of Ontario and Dominion of Canada. The complaint in this action, which is verified, contains a certified copy of the chancery decree; by this record it appears that the defendant was personally served with process; that he appeared by attorney in said court and duly answered; that a trial was there had on the merits, and that as the result of such trial a judgment was rendered against the defendant. The defendant now comes into this court and serves an answer, in which he interposes two defenses:

1. He denies any knowledge or information sufficient to form a belief as to all the allegations of the complaint, except the allegation of defendant's omission and refusal to pay the

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sum of \$195.95, that being the amount of costs entered in the foreign decree.

2. That the matter in suit pertains to real estate situate in the Dominion of Canada, and that the supreme court of this state has no jurisdiction to enforce such judgment and decree.

The first count of defendant's answer is manifestly sham and should be stricken out. In this class of cases, brought in the courts of this state to enforce the judgments and decrees of the courts of a foreign state or country, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint, will be stricken out as sham, where the defendant appeared in the original action. The defendant is bound to know whether in such a case process was served on him, and whether he appeared and answered, and whether judgment was rendered against him on the trial. These are facts which the defendant is presumed to know, and his denial must therefore be *positive* and *unequivocal*, and not upon information and belief. Such a denial is equivocal and presumptively interposed in bad faith.

The second answer is clearly frivolous. The law is well settled in this country that courts of justice in one state will, out of comity, enforce the laws of another state or country, where by such enforcement they will not violate their own laws or inflict injury upon some one of their own citizens. This court having acquired jurisdiction of the person of the defendant, it possesses full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint though the same are situated in the Province of Canada and without the jurisdiction of this court.

The defendant's answer is therefore stricken out as sham and frivolous, and judgment is ordered for the plaintiff for the relief demanded in the complaint with ten dollars costs of this motion

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N. Y. COMMON PLEAS.

SUSAN PECK agt. ANDREW PECK.

Marriage — Divorce — Prohibition in divorce decrees — Laws of 1879, chapter 321, section 49 — Rights under, saved by repealing act of 1880 — Code of Civil Procedure, section 1761.

The right of a defendant in a divorce suit, the judgment in which prohibited him from marrying again, to make application under section 49 of the Laws of 1879, for a modification of such judgment, is saved by the repealing act of 1880; and section 1761 of the Code of Civil Procedure, containing the disqualification upon re-marriage never became operative law, except as modified by said repealing act.

Special Term, January, 1881.

H. F. Farnsworth, for motion.

LARREMORE, J. — On April 10, 1874, a decree of absolute divorce was granted in this action in plaintiff's favor, in pursuance of article 3, section 1, chapter 8, part 2 of the Revised Statutes, whereby the defendant was prohibited from marrying again during the life of the plaintiff. She remarried on May 10, 1878, and is now living in the marriage relation in the city of New York.

By chapter 321 of the Laws of 1879, section 49, the statute above referred to was amended by allowing a defendant found guilty of adultery in a divorce suit, after the expiration of five years from the rendition of judgment therein and remarriage of the plaintiff, to make application to the court for a modification of such judgment upon satisfactory proof of the facts above stated, and also of the fact of defendant's good conduct since judgment was rendered. This act took effect immediately.

Such application and proofs have been produced herein, and it would appear that defendant is entitled to the relief sought.

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The plaintiff has had due notice of this proceeding, and makes no objection thereto. It remains to consider whether or not any legal impediment is interposed by section 1761 of the Code of Civil Procedure (*Session Laws* 1880, *chap.* 178).

This section would seem to restore the prohibition as to remarriage by defendant during the lifetime of the plaintiff, and is, apparently, inconsistent with section 49 of the Revised Statutes, as amended by chapter 321 of the Laws of 1879. If these statutes were the only guide to their own construction, the conclusion would follow that the latest utterance of the legislature must control, and the former act would be repealed by implication (*Livingston* agt. *Harris*, 11 *Wend.*, 329; *Warrington* agt. *Trustees of Rochester*, 10 *Wend.*, 547; *People ex rel. Foster* agt. *Bell*, 46 *N. Y.*, 57). But the legislature has not left us in doubt upon this subject, for at the same session in which it passed section 1761 of the Code of Civil Procedure, it also, on May 10, 1880, enacted a repealing act, which expressly excepts section 49 of chapter 321 of the Laws of 1879.

For the purpose of determining the effect of the act comprising the Code of Civil Procedure upon other acts, and the effect of other acts upon it, it was therein especially provided that "this [that] entire act is deemed to have been enacted on the sixth day of January, in the year 1880, and all acts passed after the last mentioned date are to have the same effect as if they were passed after this act" (*Section 3355 Code Civil Procedure*).

Moreover, said act, comprising such Code of Civil Procedure, was not returned by the governor within the time prescribed, and it became a law without his signature on May 6, 1880 (*Session Laws*, 1880, *vol.* 2, *sec.* 1), whereas the repealing act appears to have been approved by the governor, May 10, 1880 (*Laws*, 1880, *vol.* 1, *sec.* 367), and thereby became the later act.

I cannot disregard the manifest intention of the legislature as expressed by the repealing act. Repeals by implication are not favored, and acts by the governing power, not absolutely

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inconsistent or repugnant, should be construed in harmony with each other (*Rex* agt. *Justices of Middlesex*, 2 *Barn. & Adolph.*, 818; *Viners Abr.*, 132, 575; *McCartree* agt. *Orphan Asylum*, 9 *Cow.*, 437; *Mayor* agt. *Walker*, 4 *E. D. Smith*, 258; *Wallace* agt. *Bassett*, 41 *Barb.*, 92; *Smith* agt. *The People*, &c., 47 *N. Y.*, 333; *Heckman* agt. *Pinckney*, 6 *Abb. New Cases*, 371, *affirmed by Court of Appeals*; *Bowen* agt. *Lease*, 5 *Hill*, 321; *People* agt. *Denning*, 1 *Hilt.*, 271; *Van Rensselaer* agt. *Snyder*, 9 *Barb.*, 302; *Hayes* agt. *Symonds*, 9 *Barb.*, 260; *Powers* agt. *Shepard*, 48 *N. Y.*, 540-4).

Section 1761 of the Code of Civil Procedure and said repealing act both took effect September 1, 1880 (*sec. 3356 Code*; *sec. 5, chapter 245, vol. 1, Laws 1880*), so that said section containing the disqualification upon remarriage never became operative law, except as modified by said repealing act.

The defendant's right to the relief sought herein existed prior to September 1, 1880; it was saved by the repealing act; it is not necessarily inconsistent with or repugnant to section 1761 of the Code, and this application should be granted.

SUPREME COURT.

HENRIETTA ABRAHAMS, respondent, agt. CHARLES B. BEN-
SEN, survivor, appellant.

Venue — Where place of trial has been changed on application of a codefendant, and acquiesced in by the sheriff, the other defendant, under what circumstances it will be retransferred on application of defendant sheriff.

Where the place of trial of an action, begun in Rockland county, against the sheriff of that county, and a codefendant, for acts done by the sheriff in his official character, has been changed on application of the codefendant, acquiesced in by the sheriff to New York, and the case has been there tried twice, yet it being now shown that the codefendant has died insolvent; that the cause of action arose in Rockland county; that both parties and a large number of the witnesses reside there, and considering the condition of the calendar in the two counties:

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Held, that the action, on application of defendant, should be retransferred to Rockland county, as well for the public interests as for the private interests of the parties.

First Department, General Term, May, 1880. Adjourned to September 7, 1880, when the application was argued and decided November, 1880.

APPEAL from an order of the special term denying a motion to change the place of trial from the county of New York to the county of Rockland.

The action was brought in Rockland county, in July, 1875, against Elkin Hyman and Charles B. Bensen, to recover \$6,000 damages for a trespass in taking the property of the plaintiff. Bensen was then sheriff of Rockland county, and Hyman obtained an attachment against the property of Abrahams, otherwise calling himself S. L. Goldberg, the husband of the plaintiff, and directed it to Mr. Bensen as sheriff, who, by virtue of which took certain property in the town of Haverstraw, Rockland county, which the plaintiff claimed was her property.

The answer of Hyman charged that it was not her property; that her husband had done business under the name of S. L. Goldberg; had failed; had clandestinely disappeared from his creditors, and was found two years afterwards at Haverstraw, doing business in his wife's name; and that there was fraud and collusion between the plaintiff and her husband to cheat and defraud his creditors, and to hide his property from them.

The sheriff knowing nothing of these matters interposed the usual answer, that he had taken the property by virtue of legal process directed to him as sheriff, and relied upon the answer of his codefendant as to the fraud and justification.

Mr. Hyman obtained a verdict and judgment in his action against plaintiff's husband, after a trial before a jury; execution was issued to sheriff Benson; the property sold, the

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proceeds paid to Mr. Hyman, and the sheriff paid his legal fees. For a time both Hyman and Bensen were represented by George F. Langbein, Esq., as their attorney, but shortly after Hyman had an attorney substituted for himself, and moved to change the place of trial from Rockland county to New York county for the convenience of his witnesses, without giving any notice thereof to Mr. Bensen. This motion the plaintiff opposed, she making an affidavit that it was for the convenience of her witnesses to have the trial in Rockland county. Mr. Hyman succeeded, and the place of trial was changed to New York county, Mr. Bensen having received no notice, and not appearing or being heard on the motion; neither was a copy of the order ever served upon him or his attorney.

After that Hyman went to Denver city, Colorado territory, very sick in health, and pecuniarily worthless. Plaintiff took an inquest in New York county, which was opened by Mr. Bensen, who prepared to defend in chief. Mr. Hyman refused to leave Denver city unless the trial was had in New York county. A trial was then had in New York county before justice DONOHUE and a jury, commencing January 29, 1878, and ending March 5, 1878, over one month, the trial occupying ten actual days. The jury failed to agree upon a verdict.

Mr. Hyman then died, May 1, 1878. Whereupon Mr. Bensen made a motion to change the place of trial back to Rockland county upon the facts showing the illegality of the order removing it. This motion was denied upon the ground that it must be made and heard in the second department.

Upon the motion being made there, judge DYKMAN set aside the order as null and void, holding that Mr. Bensen had never had his day in court concerning it, thus removing the place of trial back to Rockland county. From this order the plaintiff appealed, and the general term, sitting at Brooklyn, reversed the order of judge DYKMAN. The defendant Bensen then appealed to the court of appeals, and that court

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dismissed the appeal upon the ground that he had acquiesced in the illegal order by going to trial upon it (*See the appeal reported in 76 N. Y. Reps., p. 629*). Another trial was then had in New York county before justice LAWRENCE and a jury, commencing December 3, 1879, and ending December 12, 1879, lasting full nine days, when the jury for the second time failed to agree upon a verdict. Justice LAWRENCE said to counsel in discharging the jury: "It would be cheaper for the county of New York, and it would save money, to pay the plaintiff's claim, rather than have the expense of another trial."

Mr. Bensen then moved, upon all these facts, to change the place of trial back to Rockland county, claiming that he had been put to enormous expense and to very great inconvenience to himself and his witnesses, by reason of the two trials in New York county; that the plaintiff and her attorney, the defendant and his counsel, Cornelius Hoffman, Esq., and a majority of the witnesses, resided at Haverstraw and Nyack, and other places in Rockland county, and that another trial in New York county would be a terrible strain upon him, and would be very expensive and of great inconvenience to these numerous witnesses; that many of them were public officials, a justice of the court of sessions, a justice of the peace, and lawyers and merchants of Haverstraw; that he had had great labor, trouble and difficulty to keep all these witnesses in New York county continuously so many days, and was often in jeopardy of losing their testimony; he dreaded that, upon a third trial in New York county, he would lose the testimony of some of them and have greater trouble, difficulty, inconvenience and expense than he had before, and gave some instances of facts of some of the witnesses refusing to attend in New York a third time for a third trial.

This motion was denied, upon the ground that the decision of the motion in the second department disposed of this, and from this order Mr. Bensen appealed.

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George F. Langbein, attorney and counsel for sheriff Bensen, made and argued the following points:

I. This motion was founded on facts occurring *after* the decision in the second department. That motion was to set aside the order removing the trial to New York county as null and void, and not to change it back to Rockland county for the convenience of witnesses; that Mr. Bensen had never had a hearing upon such a motion, and that not even upon this motion had this been passed upon, but it had been denied upon the erroneous idea that it has been passed upon by the decision in the second department. This was a motion to save the expense and inconvenience of a third trial in New York county.

II. That the convenience of witnesses and ends of justice demand a change of trial to Rockland county, pursuant to section 987, subdivision 3 of the Code of Civil Procedure. The plaintiff herself had opposed the change from Rockland county to New York county, upon the motion of Mr. Hyman, upon the ground of the convenience of her witnesses, although she now opposed it and now claimed otherwise. That her present affidavit was inconsistent with her former affidavit, which had showed seventeen witnesses residing in Rockland county, while she only made out seven now, while twelve witnesses of the defendant lived in the same county, and that it now appeared that nineteen witnesses, living, residing and doing business in the towns in Rockland county, had been examined upon the two trials, and would have to be examined on the third trial, many of them being public officers whose time, labor and presence was required in the public service by the people of Rockland county.

III. The ends of justice will be promoted by a change of the place of trial to Rockland county. (1.) Mr. Bensen had the expense and inconvenience of himself and his witnesses away from home for two trials in New York county. (2.) He had an absolute statutory right to have the trial in Rockland county. (3.) The act occurred there. (4.) It was done

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by him as sheriff by virtue of his office. (5.) The place of trial had been fixed by the complaint in Rockland county. (6.) The action had been noticed for trial there. (7.) The plaintiff and her lawyer, and the defendant and his counsel, reside there. (8.) Seven of plaintiff's witnesses and twelve of defendant's witnesses reside there. (9.) A trial in Rockland county will be less expensive and more agreeable and convenient to the witnesses. (10.) Mr. Bensen would not be in jeopardy of losing the testimony of any of his witnesses. (11.) Two New York county juries have failed to agree upon a verdict. (12.) A jury of Rockland county citizens can best determine the credibility of the Rockland county witnesses. (13.) It will be a great saving of expense to the county of New York, and great convenience to suitors in the New York circuit, whose cases have been delayed for weeks at a time, to have this case next tried in Rockland county. (14.) From the nature and facts, and the peculiarities of this case, the trial should be had in Rockland county. (15.) New York county has had the expense of two trials without result; now let the county of Rockland, which should rightfully have had the expenses, have the expense of the third trial as a matter of justice and convenience to the county of New York. (16.) Justice LAWRENCE said it would be cheaper for the county of New York to pay the claim than have another trial here. (17.) There is no claim or pretense that the plaintiff will not have a fair, impartial trial before a court and jury in Rockland county, or that any injustice will be done her.

IV. The change of the place of trial was in the discretion of the court. The plaintiff has had two chances before New York county juries. Mr. Bensen should now have a chance before a jury in Rockland county, where the trial by right belonged. The plaintiff's two opportunities in New York county have nearly ruined Mr. Bensen in expense in a matter in which he had no interest except as an officer of the government in obeying a mandate of this court. For this he received only his legal fees and he has no indemnity. The whole case

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is a Rockland county affair and it will be an act of justice to Mr. Bensen to have the case disposed of in the county and by the county where the trouble originated. In view of all the facts, he begs this court to exercise its discretionary power in his favor and further the "ends of justice" by relieving him from the oppressive burthen of a third trial in New York county. Even public interests, considering the over-crowded condition of our circuit calendars, requires it; convenience, expediency and the public interests will be better subserved by the trial of this action in Rockland county rather than in New York county.

George W. Weiant, attorney for the plaintiff, of Haverstraw, Rockland county, and *George H. Forster*, of counsel, of New York, in opposition, made and argued the following points:

I. The question is *res judicata*. 1st. The order removing the case to New York county made by judge TAPPAN, December 14, 1875. 2d. The order of judge DONOHUE refusing a change, June 5, 1878. 3d. The order of the general term, second department, December 13, 1878. 4th. The order of the court of appeals sustaining the general term. Either of these orders is conclusive of the place of trial. After three determinations of the question, the defendant is legally bound to be satisfied.

II. The order of December 14, 1875, removing the place of trial to New York county was not appealed from. It was acquiesced in for more than two years, and then, when questioned, was sustained by the general term. Motions were made in New York county. Sheriff Bensen's answer was amended there and two trials had there. He could not wait for years and then, when it suited his purposes, ask the court to change the place of trial. There was a judgment against Hyman here which he had never opened.

III. As to the witnesses who reside at Haverstraw, it was more convenient and less expensive to attend a trial at New York city than at New City, in Rockland county. The trials

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of the case and the witnesses examined show that a majority of them reside in New York or Westchester county.

IV. After sheriff Bensen's acquiescence in the orders of December 14, 1875, June 5 and December 13, 1878, his change of purpose does not justify any further action by the court.

V. No demand to change the place of trial back to Rockland was ever made.

VI. On the merits, the order of judge DONOHUE appealed from was right. The proceedings in the second department, following the order of June 5, 1878, were not only conclusive upon him, but rightfully disposed of the question. The merits have been passed on more than once; but if they were open (as they are not), the place of trial should not be changed.

DAVIS, *P. J.*—This action was brought in Rockland county, the plaintiff and the surviving defendant residing there. The latter was sued to recover possession of goods seized by him under an attachment sued out by one Hyman, who was a codefendant. It seems that Hyman undertook the defense of the action, and the sheriff, in effect, entrusted the defense to him. Hyman moved, in the second district, to change the place of trial from Rockland to New York for the convenience of witnesses. The plaintiff resisted the motion, but it was granted. The sheriff claims that this motion was made and granted without his assent or knowledge. He afterwards moved to vacate the order, which was done, but on appeal the general term of the second department reversed the order of the special term, on the ground that the sheriff had acquiesced in the change of place of trial, and was, therefore, too late on his motion. The case has been twice tried in the city of New York, the first trial occupying ten days and the second nine days, and each resulting in a disagreement of the jury.

The original motion to change the place of trial from

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Rockland to New York obviously ought not to have been granted, but it seems equally clear that the general term was right in holding that acquiescence had cured the error.

We cannot, therefore, grant this motion, on the ground that the place of trial ought to have been retained in Rockland county. The only question is whether, under the peculiar circumstances now existing, the change ought not to be made.

Both of the present parties reside in Rockland county. The defendant is prosecuted for acts done in his official character as sheriff. His codefendant is dead, and is shown to have died insolvent.

The cause of action arose wholly in Rockland county. A large number if not the most of the witnesses on both sides reside in that county. Two trials have already been had in New York, both of which have resulted in the disagreement of the jury. Nearly three weeks of the time of our courts has already been taken up with the trials. The defendant swears that it will be almost if not quite impracticable to procure the attendance of his witnesses in the city of New York again. It is obvious, we think, that it will be convenient for the witnesses on both sides to attend a retrial of this action in Rockland county. And our knowledge of the condition of the calendar in the two counties satisfies us that less delay will attend a trial in Rockland of an issue so old as this, than must attend its trial in the city. Besides, we think it is our duty to consider the state of business in the circuits of New York, and the great length of time already lost by the courts of New York in the trials that have already been had.

On full consideration, we think that the private interests of the parties and the ends of justice, as between them, will be fully as well served by a trial in Rockland as in New York, and that the public interests will be better served if the change be made. We think, therefore, that the order of the court below should be reversed and an order entered

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changing the place of trial to Rockland county, without costs to either party of the motion on this appeal.

BARRETT, J., concurs.

NOTE. — An order was thereupon entered changing the place of trial back to Rockland county, and directing the New York county clerk to forthwith deliver to the clerk of Rockland county all the papers and documents in this action on file in his office, pursuant to section 988 of the Code of Civil Procedure. [REP.]

SUPREME COURT.

EDWARD SAVAGE, as executor, &c., appellant, agt. MARY L. GOULD *et al.*, respondents.

Accounting by executor and testamentary trustee — Improper investment of trust funds — Executor's personal liability for acts of agent — also to account for commissions made on loans.

An executor must exercise due diligence in the making of loans to protect himself from personal liability for losses.

The taking second mortgages and reliance upon the judgment of others not such diligence.

When mortgages so improperly taken are foreclosed and bought in by him for the estate, executor is liable for costs, taxes, &c.

Commissions allowed to a trustee out of trust funds by mortgagees, or to his attorney, when the trustee is to share therein, remain the funds of the estate and are to be accounted for as such.

That some service was rendered by the attorney will not alter this rule when the amount is manifestly excessive, as compensation and the burden is upon the executor to establish such value.

Third Department, General Term, January, 1880.

THE facts are the same as in the appeal from the order of removal (*Supra* p. 234).

Charles W. Mead and Edwin Countryman, for appellants.

I. It was the plain and unquestionable duty of the trustee to convert the securities of the estate, other than mortgages,

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into cash, and invest in bond and mortgage as he was directed to do by the terms of the will. 1. The authorities are uniform that the trustee must follow the direction of the trust instrument as to making investments (*Burrill* agt. *Sheil*, 2 *Barb.*, 457, 469; *Gilman* agt. *Gilman*, 2 *Lans.*, 1, 6; *Forbes* agt. *Ross*, 2 *Bro. C. C.*, 430; *S. C.*, 2 *Cox*, 113; *Perry on Tr.*, secs. 452, 460, 470; *Ackerman* agt. *Emott*, 4 *Barb.*, 626; *Bohde* agt. *Bruner*, 2 *Redfield*, 333; *Mant* agt. *Leith*, 15 *Beav.*, 524 and 527). 2. Even had the trust instrument been silent on the subject, his duty would have been the same as to conversion and investment (*Gillespie* agt. *Brooks*, 2 *Redfield*, 349; 1 *Perry on Tr.*, sec. 440). 3. The onus of showing that no conversion of securities is intended is on those who say it is not (*Morgan* agt. *Morgan*, 14 *Beav.*, 72; *Blann* agt. *Bell*, 2 *Degex*, *McN. & G.*, 775, 779). 4. The terms of the will and the general rules laid down by courts of equity coinciding in this case, it would not be possible to more completely justify the course of the trustee. 5. In performing this duty of converting the assets, the trustee exercised such good faith and prudence as to secure a net gain of nearly \$12,000 to the estate. (a) In all these cases the values of the securities were lower both at the time of appraisal and at the time of rendering the account than at the intermediate time of sale. In some cases the lowest price was *before*, and in other cases *after* the time of sale, but in all cases the trustee took advantage of the highest prices to realize the cash on the securities he was required to sell. 6. The mortgages outstanding at the time of testator's death have not been disturbed.

II. In making the investments which are disallowed by the surrogate, the appellant exercised the utmost degree of care and prudence which is required of a trustee. 1. Investigations and inquiries as to the value of the property, and also as to the title, &c., were in each case made and reported to him by Mr. C. (a) C. was not the mortgagor's solicitor, but the trustee's own partner, a lawyer in whom he had

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entire confidence, and who was employed for the requisite services because of that confidence. (b) This confidence was reasonably based upon the relations between C. and himself. (c) It was further justified by the observation and experience of the trustee in reference to Mr. C.'s estimates upon property which they had examined together. (d) The course of the trustee was that which is in universal practice in such cases, viz., that services of this kind should be performed by the solicitor of the mortgagee, though paid for by the mortgagor. 2. In the case of the most important loan (that of \$5,000 to Geo. Martin), the trustee obtained the valuation of an expert, a competent real estate agent of the city of Albany, who placed a value upon the property of more than three times the amount of the loan. 3. In respect to all of these mortgages, the trustee, before making the investments, had such information regarding the value of the property as would show the investment to be proper and judicious under the strictest rules of the courts, and the correctness of such information was established by the evidence given on the accounting. (a) The market price and the value as determined by actual sales, are considered by prudent business men, as well as by the courts, the best evidence of value. (b) Opinions of value are a weaker kind of evidence, to be depended upon when actual sales or the market price cannot be shown (*Graham* agt. *Maitland*, 37 *How.*, 307, 309; *Mains* agt. *Haight*, 14 *Barb.*, 76, 83, 84; *Harrison* agt. *Glover*, 72 *N. Y.*, 451, 454, 455; *Whipple* agt. *Walpole*, 10 *N. H.*, 130; *Beard* agt. *Kirk*, 11 *N. H.*, 398, 401; *Kellogg* agt. *Krauser*, 14 *Serg. & Rawle*, 137, 142; *Brill* agt. *Flagler*, 23 *Wend.*, 354, 356). 3. In reference to these investments, evidence was offered by the trustees as bearing upon the actual values and also upon the question of his good faith and prudence, which was improperly rejected by the surrogate. (a) The evidence thus offered was of numerous sales of lots of the same kind and in the immediate vicinity of the mortgaged property at or near the time of the respective

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loans. (b) The best proof of such transactions was the conveyances themselves as the first link in the chain of evidence. (c) In one instance the conveyance offered in evidence was of a portion of the very property included in the mortgage. (d) There was also coupled with these various offers the additional offer to show that the trustee had knowledge of the sales at the time of the loans, and relied upon that information in part in making them. These various offers and the rulings of the surrogate thereon will be found in case.

III. The trustee having, in good faith, invested the funds of the estate in the kind of investment directed by the testator, and with that degree of care, diligence and prudence which prudent men of discretion and intelligence in such matters employ in their own like affairs, he cannot be charged with any loss that may have occurred (*King* agt. *Talbot*, 40 *N. Y.*, 76; *Harvard Coll.* agt. *Amory*, 9 *Pick.*, 461; *Brown* agt. *French*, 125 *Mass.*, 410; *Lovell* agt. *Minott*, 20 *Pick.*, 116; *Thompson* agt. *Brown*, 4 *Johns. Ch.*, 619, especially 628, *et seq.*; *Jones* agt. *Lewis*, 3 *De Gen. & Sm.*, 471; *Mikel* agt. *Mikel*, 5 *Rich. Eq.*, 220; *Gray* agt. *Lynch*, 8 *Gill.*, 403; *Neff's App.*, 51 *Penn. Stat.*, 91). A trustee who is an attorney is entitled to his taxed costs in a suit conducted by him for the estate when paid by the other party to the suit (*In the Matter of the Bank of Niagara*, 6 *Paige*, 213, 215; *Collier* agt. *Munn*, 41 *N. Y.*, 143, 147).

IV. The trustee cannot be required to account to this estate for the compensations paid by the mortgagors for legal services rendered in connection with mortgages which are accepted by the respondents and all their benefits retained by the estate. 1. They were not paid by the estate, nor out of the funds of the estate, nor for services rendered to the estate. 2. They were not profits made by the trustee or his partner out of estate funds, but the wages for services actually rendered. A trustee who was a solicitor sold out stock forming

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part of the trust estate, and invested it in mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estate for building purposes. The court of appeals in Chancery held that the *cestui que trust* could not charge him with the profit thus made, as having been made by the employment of the trust estate in business (1869, *Whitney agt. Smith*; *Law Reports*, 4 *Ch. App.*, 513). Where a trustee deposited trust funds with a banking firm of which he was a member. Held, by the supreme court of Pennsylvania that the fact that he as one of the firm might have received profit from the use of the moneys so deposited, would not make him liable for interest on the fund (1871, *Hess Estate*, 68 *Penn. St.*, 454).

3. They were not usurious (*Harger agt. McCullough*, 3 *Denio*, 119; *Eaton agt. Alger*, 2 *Abb. Ct. App. Dec.* 5; *S. C.*, 2 *Keyes*, 41, 47; *Thurston agt. Cornell*, 38 *N. Y.*, 281; *Eldredge agt. Reed*, 2 *Sweeney*, 155; *Wheaton agt. Voorhies*, 53 *How. Pr.*, 319; *Van Tassell agt. Wood*, 19 *Alb. Law J.*, 217, reversing *S. C.*, 12 *Hun*, 388; *Matthews agt. Coe*, 70 *N. Y.*, 239).

4. There being no evidence whatever that the amounts so paid were unusual or extortionate, there can be no presumption that they were other than what it is claimed by the trustee that they were, viz.: fair and reasonable compensations for services actually rendered to the mortgagors.

5. They were entirely unobjectionable, unless it is unwise and imprudent for a trustee or mortgagee to require the mortgagor to employ and pay such mortgagee's own solicitor to manage legal transactions and pass upon legal questions which are of the utmost importance to the estate or fund under his control (*See Eldridge agt. Reed*, 2 *Sweeney*, 115; *Wheaton agt. Voorhies*, 53 *How. Pr.*, 319, 320, 321).

6. The course pursued in this estate being in accordance with the practice established in the lifetime of the testator, he

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must have expected and intended that the same methods would be adopted in the investment of the trust funds under his own will. 7. Under no circumstances could the trustee be held chargeable with those compensations which were received by Case alone, or with the portion received by Case of those which were shared as partnership earnings. (a) A trustee's partner may receive fees to himself, even from the estate, for services rendered to the estate (*Lewin on Trusts*, 240; *Clack agt. Carlon*, 30 *Law J. Ch.*, 640). (b) A trustee cannot in any event be charged with more than he has received (*Osgood agt. Franklin*, 2 *Johns. Ch.* 1, 27; *Hamburgh Man. Co. agt. Edsall*, 1 *Beas.* [12 *N. J. Eq.*], 392, 401; *Jones agt. Foxall*, 15 *Bea.*, 388, 395).

Alva H. Tremain and *Andrew Hamilton*, for respondents.

I. The moneys received on account of loans by the appellant and his partner, or by the partner and enjoyed by the appellant, and which descriptions cover all the moneys charged in item IV, were clearly the avails of dealing with the trust funds, unless they are to be regarded as a part of them, which was never invested, and in either aspect it was the duty of the appellant to account for all of them. These bonuses will be found (*supra*, p. 7, schedule "D," marked as Nos. 1, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14), which were received and divided between S. and C., and of which the appellant admits he retained his share. Nos. 16, 17, 18, 19, 20, 22, 23, 24 and 26, which were received by C., paid by him to S. as treasurer of the firm, equally divided between them, and by each their share retained down to May 3, 1876, when they ante-dated their articles of copartnership, dating them back fifteen months after all but \$10,800 had been invested, out of a total investment now outstanding of \$107,629.33, for fear of the question of usury being raised, and S. pretended to pay back his share to C., by giving him a check for \$290.75, months after its receipt and division, whereas the amount thus received by S. was \$1,283.37; and Nos. 28, 29, 30 and 31, which S.

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in reality participated in by being exempted from the payment of all office expenses (shown during fifteen months to be \$2,105.25). (a) A trustee will not be permitted to make profit for himself out of the trust property; and he is equally prohibited from purchasing or dealing with it for his own gain (*Colburn agt. Morton*, 36 *How.*, 150-160, *Court App.*, and cases; *Same Case*, 5 *Abb.* [*N. S.*], 308 to 316, *Court Appeals*; *Littlye agt. Beveridge*, 58 *N. Y.*, 592-606; *Fulton agt. Whitney*, 5 *Hun.*, 16; 3 *Redf. on Wills*, 402, 403, 553; *Story's Equity Jur.*, sec. 1277, a; *Van Epps agt. Van Epps*, 9 *Pai. Ch.*, 237; *Kellogg agt. Wood*, 4 *Pai. Ch.*, 578; *Holloway agt. Stevens*, 48 *How.*, 129; *Lewin on Trusts* [6th ed.], 243). This the trustee has done by putting up the job of letting C. handle the money, abstract large sums therefrom, while he came in covertly for his share of the plunder. One who joins with him is also disabled (*Sweet agt. Jacocks*, 6 *Pai. Ch.*, 355). An usage authorizing an agent to make a profit upon his principal is a usage of fraud and plunder, and cannot be supported (*Diplock agt. Blackburn*, 3 *Campb.*, 43), where it is held that if the master of a ship in foreign port receive a premium for a bill on England on the ship's account, although the usage is for masters to appropriate such premiums to their own use, yet this belongs to the owner of the ship. A subordinate or agent of trustee is equally disqualified from making gains out of the estate, where it is to be shared in any way by the trustee (*Terwilliger agt. Brown*, 44 *N. Y.*, 237-40-41, *affirming* 59 *Barb.*, 9; *Hawley agt. Cramer*, 4 *Cow.*, 717). Nor can the trustee or executor give it to one and then take back a part to himself (*Powers agt. Powers*, 48 *How.*, 389). If he charged a bonus in his account for skill and services in conducting the business of the trust, it will be set aside (*Perry on Trusts*, vol. 1, secs. 427, 428, 429, and vol. 2, sec. 904). No profit can be made by them for increase (3 *Rev. St.* [6th ed.], sec. 70, p. 101). Nor can his partner make any profits out of the trust funds, or for the performing of services, unless the partner alone takes the profits. Nor can

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either charge for professional services where both would share in the proceeds (3 *Redf. on Wills*, 556, *sec.* 118; 3 *Redf. on Wills*, 416, *note*; *Collier agt. Munn*, 41 *N. Y.*, 143, 146; *Perry on Trusts*, *vol.* 1, *pp.* 520–21, *sec.* 432; *Lewin on Trusts* [6th ed.], 249, 243). Whether usurious or not, the trustee must account for all gains (*Perry on Trusts*, *vol.* 1, *p.* 571, *sec.* 468; 3 *Redf. on Wills*, 406, *secs.* 18). The rule in England and America is that a trustee must account for all profit he has made (3 *Redf. on Wills*, 402, *secs.* 10, 11; 403, *sec.* 12; 406, *sec.* 18; *Utica Ins. Co. agt. Lynch*, 11 *Paige Ch.*, 520). Trustee cannot even charge costs in an action against him personally for acts arising out of his attempts to protect trust property (*Pierson agt. Thompson*, 1 *Edw. Ch.*, 212). Thus showing how strictly the rule is applied to trustees who seek to make litigation for the purpose of taking costs out of the estate as they have done in this estate, the amount being over \$1,997.30, as already proved, with five other foreclosures pending, part of which were defended by pleas of usury, and in which costs would doubtless be \$2,500 more. All he is entitled to, under the statutes, is the commissions that the law gives him and his necessary expenses; hence, all other profits go to the estate (3 *R. S.* [6th ed.], *p.* 101, *sec.* 58; *Id.*, *p.* 102, *sec.* 66). All these bonuses should have been accounted for and were property of the trust (*Perry on Trusts*, *vol.* 1, *secs.* 427–430, *and sec.* 468, *p.* 571; *Tiffany on Trusts*, 554–558). Being the moneys and profits of the trust, appellant refused to include them in account, appropriating them to his own use, endeavored to conceal their receipt and hide it from investigation or discovery by his antedated articles of copartnership, and calling it expenses of office and otherwise. (b) These moneys cannot be regarded as mere legal expenses incurred and charged for services in perfecting searches and papers. This view is placed entirely out of question when the amounts charged are compared with the amount of the loan. (c) C. was the agent in these loans of the trustee. His receipt in every case says so: "Received, Albany,

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N. Y., April 9, 1875, of S., executor and trustee, &c., fifteen hundred dollars, to be loaned to Joseph Fellows for one year from date thereof on bond and mortgage. (Signed) T. L. C." C. being such an agent of S., and S. being the trustee and responsible to the respondents, these amounts which were taken as bonuses were really the moneys of the estate which had never been invested. They never left the hands of the appellant and his partner C., who was given the money to "invest," &c. In each case they took their moneys out of the fund that was to be loaned, so that in fact it never was loaned, but remained the money of the estate in their hands. In every one of these cases the bonuses belong to the estate (*Perry on Trusts*, secs. 429, 430, vol. 1, p. 571). (e) Regarding C. as the agent of S., there is no substantial difference between the bonuses which S. took and kept, or took, kept and pretended to return to his agent, or took indirectly from his agent as office expenses. The agent is equally estopped with his principal, who is liable for his acts and accountable for his receipts and profits. (a) It was the duty of the trustee to see that the investments were secure, productive of interest, and subject to future recall (*Ackerman agt. Emmott*, 4 Bar., 626; *King agt. Talbot*, 40 N. Y., 76, 86, 88; *affirming same case*, 50 Barb., 453, 484; *Tiffany on Trusts*, 587, 600, 601, 602, 603; *Smith agt. Smith*, 4 Johns. Ch., 281; 4 Edw. Ch., 718). A trustee should not loan more than one-half to two-thirds of the value of the property (*Bogart agt. Vanvelsor*, 4 Ed. Ch., 718-722, 723; 40 N. Y., *supra*; *Dayton Sur.*, 522). It may be improper to loan even two-thirds (*Perry*, vol. 1, p. 549, sec. 457; *Lewin on Trusts* [6th ed.], 286). (As when, as in this case, loans are made on a falling market.) In each of these cases the evidence conclusively established not only that the amount loaned was in excess of this rule of two-thirds, but the full value of the property was in no instance as great as the mortgage, but that it was practically worthless. Where this rule is violated it is well settled that the trustee is personally liable for the loss accruing (40 N. Y.,

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76, *supra*; 50 *Barb.*, 453, *supra*; 4 *Edw. Ch.*, 718, *supra*; 3 *Redf. on Wills*, 559; *Baker agt. Disbrow*, 18 *Hun.*, 29; *Gillespie agt. Brooks*, 2 *Redf. Rep.*, 349-360). And a *cestui que trust* is at liberty to elect to approve an unauthorized investment or reject it at his option (*Id*; 3 *Redf. on Wills*, sec. 452; *Dayton on Sur.*, 522). And where separate investments are made, he may adopt or reject each, as his interest dictates (*Id*; *Perry on Trusts*, sec. 621, vol.). And where improper investments are rejected, the trustee can be charged with the amounts and legal interest thereon (*Baker agt. Disbrow*, *supra*; *King agt. Talbot*, *supra*; *Tiffany on Trusts*, 593-595; *Perry on Trusts*, vol. 1, secs. 468-472; *Bodie agt. Bruner*, 2 *Redf. Rep.*, 333-337; 3 *Redf. on Wills*, 402). (b) It is no answer to charge Case with these wrongs, whether he be regarded as the agent of the mortgagor or the appellant. A trustee cannot give funds to a solicitor, and allow him to misapply them, and then escape responsibility (*Brown's Accounting*, 16 *Abb. [N. S.]*, 457 and 466, and numerous cases cited; *Tiffany on Trusts*, 597, 570; 3 *Redf. on Wills*, 547, 548; *Perry on Trusts*, vol. 1, sec. 402). If trustees rely upon a valuation made by the mortgagor, or a surveyor, who is his agent, without having a survey of the value on behalf of the estate, it is a breach of trust, and they will be held liable for any deficiency in the value of the security (*Lewin on Trusts* [6th ed.], p. 286, sec. 25). Nor must he employ the solicitor of the borrower to fix upon the value or survey, which he did in every loan (*Lewin on Trusts* [6th ed.], p. 279, § 59). (c) The Fellows second mortgage of \$900, treated as an investment, was, within the rule, properly charged against the appellant. A trustee should never loan on second mortgage (*Perry on Trusts*, vol. 1, p. 550, sec. 457; *Lewin on Trusts* [6th ed.], p. 291, sec. 40).

IV. In item VIII of decree the surrogate properly disallowed the credit claimed for appellant's commissions, \$500. He claimed to take them on his own responsibility. This merely rejected the amount as a credit of \$500 on the date of July

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3, 1877, and allowed it in full finally, with his other commissions, as of the date of settling the decree and allowance of commissions by the surrogate. There is no power in a trustee to take his commissions out of the estate until they are allowed by the surrogate, and if they are taken before they will be charged with legal interest (*Redf. Sur. Prac.*, 385; *Wheelright agt. Wheelright*, 2 *Redf. Reps.*, 501; 3 *Rev. Statutes* [6th ed.], p. 101, sec. 71).

V. The appellant was properly charged with legal interest on the improper investment rejected, and on the bonuses for which he refused to account, and which was a part of the original money he pretended to loan. Where the acts of a trustee are willful, he is to be charged with interest at the legal rate of seven per cent (*Baker agt. Disbrow*, 18 *Hun*, 29; *Perry on Trusts*, vol. 1, secs. 468-472; *Tiffany on Trusts*, 593-595; *King agt. Talbot*, 40 *N. Y.*, 95; *Bodie agt. Brunen*, 2 *Red. Sur. Rep.*, 333, 337).

VI. Appellant was properly charged with all the items of disbursements, in connection with the improper investments rejected, and interest thereon. The property received by the estate was returned to him, and he merely is charged with and pays back the price which it cost the estate.

VII. The counsel fee, which was claimed below, should go to counsel and not to executor, was correctly allowed to the executor (*Laws 1863, ch. 362, sec. 8, sub. 4*; *Brown's Accounting*, 16 *Abb. N. S.*, 457, 469; *See all decrees in Albany Surrogate's Court since 1863*; *Betts agt. Betts*, 4 *Abb. [N. S.]*, 436; *Devin agt. Patchin*, 26 *N. Y.*, 441). They sought to show value of property and good faith of trustee by simply introducing deeds and records of other pieces of real estate as recorded in Albany and Rensselaer counties. In each case the surrogate held that they could show value and good faith in any legal way, but he would not take the record of consideration in other deeds, and of other property, as a basis of the value of the property in question; but in every case they were allowed to show the appellant's good faith, by testi-

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mony that he had acted upon the strength of such records and sales. It was only to the rejection of these records as evidences of value (and not as influencing the appellant) that any exception was taken.

BOARDMAN, J. This is an appeal by the executor from the decree of the surrogate of Albany county upon a final accounting. The executor was disallowed the amount of certain investments made by him for the reason that he had not exercised due diligence, or any care or diligence in making such loans. The evidence fully sustains such allegations. In some cases the property was worthless. In other cases the security taken was a second mortgage, while the first was for the full value of the mortgaged premises. In still other instances the mortgaged premises were barely of sufficient value to pay the expenses of foreclosure. Again, a second mortgage was purchased by himself when the prior incumbrance upon the property exceeded its full value. The executor had used no caution in making these loans; he had not examined the property or secured proper searches and valuations before making the loans. Casual inquiries were made by Case, his law partner, and large sums of money were loaned by Case upon his own discretion and judgment. As a consequence the estate lost heavily. In some cases not a dollar of interest was ever paid. The mortgagors were insolvent and they were satisfied with the prices which they had got out of this executor for their property and abandoned it to him or the estate. The most ordinary business tact and talent, the lowest degree of care and prudence would have protected the estate from such miserable and worthless loans and consequent losses. The executor was properly disallowed such investments (*Bogart agt. Van Velser*, 4 *Edw. Ch. Rep.*, 718).

The executor was properly chargeable with the amount specified in the eighth item of the decree. He was with equal justice charged with costs, expenses, taxes, &c., which flowed naturally and necessarily from such original negli-

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gence. These items are also disallowed in eighth item of decree.

The executor is also charged with certain amounts received upon loans made, as specified in item 4 of the decree ff. 3798, &c., to which exception is taken.

The moneys were received by the executor or his law partner as a bonus or commission for the loans made. It is true that some services were rendered, and, perhaps, some slight expenses paid by Case, which he might properly have charged to the borrower. But it is impossible from this accounting to separate such sums from the gross sums charged and received. It is apparent the transaction was, in effect, a demand of a bonus as a condition of making the loan, which the borrower paid. In some instances that was all he ever paid or could be made to pay. It frequently appears that borrowers furnished searches which Case was called upon to examine. Such searches were doubtless paid for by the borrowers. There is a good deal of reason to believe, from the evidence, that the borrowers paid all, or very nearly all, legitimate expenses attending the loans and then paid the percentage demanded by way of bonus. However that may be, the executor and Case, his law partner, shared between them in some form the sums received from the borrowers. For a time they received it on joint account and divided it equally like the receipts of their law business. As this course was obnoxious to criticism, an arrangement was made to evade the natural consequences of such conduct and to avoid the inferences that might be drawn therefrom. Then it was agreed that Case should own the commissions thus received. But that the executor might not lose his share of the profits, Case, in consideration thereof, was to pay an equivalent towards office expenses of the law firm. Thus, in any event, the executor was stipulating for a share of all sums received from borrowers on account of loans made to them.

The executor undertakes to justify his conduct. He alleges these moneys did not come out of the estate; that the estate

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has not paid them, and therefore he has not made these profits out of the estate. He also alleges they were payments made for legal services rendered. The last assertion has been partially considered. Case was either the attorney for the executor or for the borrower. If for the executor, then the bonus obtained from the loans continued to be assets in the executor's hands belonging to the estate. He had never parted with them, and he would not be at liberty to charge such sums to the estate under the plea or pretense that they had been included in the loan. If Case was the attorney for the borrower, then the executor is grossly censurable. He places the funds of the estate in the hands of the borrower or his attorney without exercising the slightest care, discretion or judgment, such as the law requires of him. He does this in consideration of the commissions he is to share. He, in effect, farms out the funds of the estate and transfers his duties under his trust as a lender to the borrower. He says to Case, "Here are the funds of this estate. I don't want to be troubled with them. If any of your friends want to borrow them, you lend the money, but you must understand you are not my agent or attorney but the attorney for the borrower. All I ask for the abdication of my duties as trustee in your favor, the only consideration for shutting my eyes and betraying my trust is, that you shall pay to, or for me one half of all you can squeeze out of the borrowers by way of bonus, commission or fictitious claims for services and expenses."

In this mode the property is made subservient to the interests of the executor and Case. The executor gets his commissions from the estate for what he ought to do. He fails to do it, but transfers to some irresponsible person his rights and duties. Such person administers the property for the benefit of the executor and himself. Such administration almost of necessity involves loss and invites plunder. Public policy will not sanction such a mode of discharging trust duties, or the employment of such means of personal gain to the trustee.

After charging the executor with all these illegitimate gains,

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the estate is still heavily the loser by the mode in which the business was done. The executor is responsible for amounts received and retained by Case as well as those received by himself. They were acting by a common purpose. What was done was by the authority and consent of the executor. Case's acts were attributable to the executor, and the latter was justly charged with Case's receipts thus obtained.

The case would not be more palpable if the executor had allowed Case to loan the money of the estate at four, five or six per cent, while one, two or three per cent was obtained from the borrowers for the benefit of the executor and Case. In the present case the money was loaned upon poor security, because a heavy bonus could be there obtained. On good securities it could not be had. In the case supposed, the money is loaned at a low rate of interest, because the difference between that and a fair rate can be pocketed by the trustee and his partner. The wrong is too evident for discussion.

It is not simply that this money comes out of the estate, though that is practically true, but it is because to tolerate such conduct would expose trust estates to the rapacity of self-interest scarcely concealed and to most destructive waste. Trustees would cease to be responsible for the discharge of the duties imposed by law upon them. They would be authorized to transfer them to a partner, a clerk or a stranger upon such terms as should yield the greatest profit to the trustee without reference to the interests of the trust estate.

Undoubtedly, professional services rendered by a trustee who is a lawyer, to and for the benefit of another, may be charged for and the lawyer may keep the money so earned. But such transactions cannot be made a cover for bleeding the estate by stealth and indirection. The services rendered must be distinctly charged, must be consistent with the interests of the estate, must not be mixed with other and improper charges so as to be indistinguishable and incapable of separation. The charges in this case were not of the kind described. If there were any such which were capable of separation they

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might properly be allowed to the executor. There are none, or at least the executor in his accounting has not shown any such items in a way to entitle him to be allowed therefor. If he suffers any wrong in this respect it is occasioned by his fault and neglect.

There is a further exception to the disallowance by the surrogate of a payment by the executor of \$450 to one Cottrell, or his agent, in connection with the loan on the Smith property the executor obtained, as collateral security for the payment of the debt, an assignment of all the rents, profits and issues of the mortgaged property, with authority to collect the same. Out of the collections thus made the executor paid to Cottrell \$450 upon a chattel mortgage which, it is said, Cottrell held against the personal property of Smith. It is now claimed that at the time of taking the mortgage an agreement by parol was made, whereby the executor agreed to pay this amount out of the rents collected, to Cottrell, who took a chattel mortgage on Smith's personal property. Such an agreement, if made, was in direct conflict with the real estate mortgage, by which the rents were to be applied to the payment of that mortgage only. If such parol contract was made before the real estate mortgage, by the parties thereto, it was merged in the mortgage. If after, it was without consideration so far as appears, and besides, was a contract which the executor had no right to make to the detriment of the security of the estate, which he already had. But it does not appear that Smith, the mortgagor, was a party to any such contract, or that Cottrell had any valid prior lien on the mortgaged premises. Again, as it was no part of the executor's duty to pay Smith's chattel mortgage out of the assets of the estate, he ought at least to have demanded and received an assignment of the security which he paid, to wit, the chattel mortgage. In that way it may be assumed, though possibly not true, that the estate would have obtained, through the chattel mortgage, what it had lost through his payments from rents derived from the mortgaged premises. No reason is

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assigned, or can be imagined, why the executor was not entitled to all the security Cottrell had against Smith upon payment to Cottrell of his debt. We think, therefore, the executor was properly charged with such \$450, thus lost to the estate. Should the amount ultimately be realized from Smith, it may become possible for the executor to reimburse himself.

There was no provision of the will making it the duty of the executor to sell and convert the United States bonds belonging to the estate, for the purpose of investing the proceeds in bonds and mortgages. Yet it was in the discretion of the executor to do this. So far as his sales of such securities are concerned, no fault can be found with him. He realized the market rates, which were higher than when the inventory was taken. The incompetency and gross negligence, if not wrong, occurred when the investments were made. If they had been made with proper care and judgment, such as a trustee should possess and exercise, no great harm could have come to the estate, though it would doubtless have suffered loss in any event from the sale of the choice securities left by the testator.

The executor cannot justify his action by any example set him by the testator in his life. The duties of a trustee are not regulated by the practice of any individual or class of men, but by well-settled principles of law of long standing. Experience has shown the necessity of a strict adherence to safe, equitable rules for the protection of trust funds. This may, and often does, work hardships upon trustees, who may have acted with good faith and honestly for what was believed the best interest of the funds in their hands. But it is better that trustees should occasionally suffer harshly rather than to destroy the security of beneficiaries or the safety of trust estates by weak indulgence in sympathy or charitable disregard of wrong or misconduct.

The result of the examination of this case leads to the affirmance of the decree of the surrogate with costs against the appellant personally.

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SUPREME COURT.

EDWARD SAVAGE, as executor, &c., appellant, agt. MARY L. GOULD *et al.*, respondents.

Executor and testamentary trustee — Power of surrogate to remove trustee for dishonesty — What is evidence of improvidence and dishonesty.

Delegation to others the exercise due from a trustee of his judgment is evidence of incompetency.

So is the investing of trust funds on second mortgages and conversion of good securities for reinvestment.

Surrogates finding that the taking of commissions on loans made by a trustee or by his partner for him, is evidence of dishonesty warranting a removal, approved.

Emerson agt. Bowers (4 N. Y., 449) distinguished.

Surrogate may remove testamentary trustees (*Contra: Blake agt. Sands, 3 Redf., 168*).

Chapter 79, Laws 1873, giving surrogates power to remove executors for dishonesty construed, with chapter 482 of 1871, as giving similar jurisdiction over testamentary trustees.

Third Department, General Term, January, 1880.

THIS was an appeal brought by an executor and trustee. The decree made by the surrogate upon the petition of the widow of the testator and beneficiary under the trusts and also mother of the other respondents who are infants and children of deceased, praying in her own and their behalf for his removal from said offices for his incompetency as improvident and dishonest. Upon this petition a citation was issued to appellant to show cause why its prayer should not be granted. He answered, denying the petitioner's charges. The surrogate found the charges to be true, and made the order here under review, removing said appellant from said offices of executor and trustee. He appealed to the court, charging the decree to be erroneous in every part. By the will, which was admitted to probate Albany county, December 14, 1874, deceased gave to his executor power to sell all real estate

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“of which he might die seized, or possessed,” in his discretion. After some few minor bequests, the will directed the executor to divide the remainder into five equal shares, and be devised to such executor one of such equal fifth parts for each of his five children by separate devises, the same to be “in trust forever; to invest and reinvest the same in good bonds and mortgages, and collect the interest and income thereof, and out of the same to pay for the education, proper and reasonable support and maintenance of said child, and invest for his or her advantage whatever balance of such interest and income there may remain after paying the same on good bonds and mortgages.” The inventory showed the estate to consist of fourteen first mortgages, of \$31,350, and about \$53,395.37 government bonds, and about \$42,000 first mortgage railroad bonds of higher per centage and equal standing with the governments. The total of the inventory was about \$176,000, and No. 80 Dove street. Appellant accepted the execution of these trusts. In March, 1875, he associated with himself C., a law partner, who was a Pennsylvanian; had neither done business, nor resided, nor owned real estate in this state, excepting a temporary residence of a year and a-half, about 1865, in New York city as a law clerk and broker, and at the time of these occurrences was bankrupt and unable to take property in his name. Appellant would inform C. that there were, or C. would ask if there were, moneys to loan. These bonds would be placed in the market, and the proceeds invested on many worthless and many nearly worthless mortgages. The mortgagor would see C. and deal with him, only paying no attention thereto and referring applicants for loans to C. It was C.’s custom to negotiate the investments, and the appellant delivered the money to him to loan and took his receipt substantially as follows:

“Received, Albany, N. Y., April 9, 1875, of S., executor and trustee, \$1,500, to be loaned to Joseph Fellows for one year from date thereof, on bond and mortgage.

(Signed.)

“T. L. C.”

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C. would inspect the property and report his opinion on behalf of mortgagor to S., generally alone, and only in a few instances did S. claim to have made personal inspection on the property, and admits in twenty-two mortgages of \$35,100, where he simply let the mortgagor and C., whom he claimed did not represent him but the mortgagor, and who had no experience in real estate, fix the sufficiency of property as security, arrange and complete the loan, S. taking no part therein after paying over the money to C. to be loaned, and then shared the bonus received on the loan. C. would pay by his check to the mortgagor the amount, less the bonus, usually of large per cent, receive the bond and mortgage and deliver them. These bonuses were down to May 3, 1876, always turned over by C. to the appellant who was treasurer of S. and C., and then from time to time divided equally between them as partnership funds. Afterwards a change of procedure took place. To avoid objections they concluded the appellant should not receive directly any of the bonuses, but that they should be applied to the payment of the expenses of the firm of S. & C.

The estate, as it came to the trustee's hands, could be inexpensively managed and only required his services. The evidence tended to show that the financial distresses of the country which struck down the value of real property started in 1873, and, in the city of Albany and vicinity, had accomplished the great reduction before the investments, to which exception was taken, were made by the trustee. Of about \$107,000 mortgage investments but about \$30,000 was productive.

Charles W. Mead and *Edwin Countryman*, for appellants.

I. The surrogate had no jurisdiction to entertain the application to remove the testamentary trustee for dishonesty in the management of the trust estates. Under chapter 482 of Laws of 1871, power is conferred on the surrogate to remove testamentary trustees "in the same manner as now (1871) provided" for the removal of executors or administrators, and

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for the removal of testamentary guardians the same as other guardians (1 *Laws of 1871*, page 1010). 1. As the law existed in 1871, the surrogate had no authority to remove an executor or administrator for "dishonesty." The only ground of absolute removal under the Revised Statutes was "that he had become incompetent to serve" (2 *Revised Statutes*, 72, sec. 18; *Id.* 75, sec. 32). And "incompetency" was then defined by statute, so far as applicable here, to be merely such unfitness as was caused "by reason of drunkenness, improvidence or want of understanding" (2 *Revised Statutes*, 69, sec. 3). And it was distinctly held that such incompetency did not include misconduct or mismanagement on the part of the trustee in his official relations to the trust, nor his personal insolvency, but referred rather to his general habits of mind and conduct and the want of ordinary care and forecast in the acquisition and preservation of property (*Emerson agt. Bowers*, 14 *N. Y.*, 449, 454, 455). 2. In 1873 the above section of the Revised Statutes relating to executors was amended by inserting the word "dishonesty" between "drunkenness" and "improvidence," in the definition of incompetency (*Laws of 1873*, chap. 79, p. 159). 3. But this subsequent amendment of the Revised Statutes in relation to executors did not modify or affect the prior act of 1871 relating to testamentary trustees. The authority to remove such trustees is only to be found in the act of 1871, and it necessarily follows that the jurisdiction of the surrogate is limited to the exercise of such power as was contemplated and conferred by that act. Without reference to the language of the act, it is apparent that it must have been passed with express reference to the provisions of the Revised Statutes then in force. And the rule is elementary in the construction of statutes that whatever is within the spirit and intent is within the statute, even if against the letter (*People agt. Utica Ins. Co.*, 15 *Johns.*, 358; *Jackson agt. Collins*, 3 *Cow.*, 89; *White agt. Wager*, 32 *Barb.*, 353; *Smith agt. People*, 47 *N. Y.*, 330). But the terms of the act of 1871

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are clear and explicit. The same "power and jurisdiction" is given for removing testamentary trustees "as now provided" for "the removal of executors," &c. And nothing more could be given by any reference to existing laws, unless it were conferred by the terms of the act itself, of which there is no pretense. 4. This rule has been frequently applied in analogous cases. It was provided by statute in 1837 that costs in surrogates' courts should be taxed under the common pleas fee bill then in force and contained in the Revised Statutes (*Laws of 1837, p. 536*). And although that fee bill was repealed or modified in 1840 (*Laws of 1840, p. 336, sec. 40*), and that court was abolished by the constitution of 1846, and entirely new rates of costs were adopted by the Code, it has been repeatedly held that the old common pleas fee bill remained in force for the cases provided for in the act of 1837 (*Western agt. Romaine, 1 Bradf. R., 37; Wilcox v. Smith, 26 Barb., 316, 330; Davis v. Patchin, 25 How., 5; Same Case, 26 N. Y., 441, 448*). So, in mandamus cases, costs were first authorized in 1833 (*Laws of 1833, p. 395, sec. 6*), when the old fee bill contained in the Revised Statutes was in force; and, notwithstanding that fee bill was expressly repealed in 1840, and a new fee bill adopted, and again, in 1848, entirely new rates of costs were provided for in the Code, it was held, in 1863, that costs in such cases were still to be taxed under the old fee bill of the Revised Statutes (*People agt. Commissioners of Highways, 28 How., 159*). 5. The surrogate is a creature of the statute. His jurisdiction is special and is limited to the powers expressly conferred in the statute (*Corwin agt. Merritt, 3 Barb., 341; Cleveland agt. Whitor, 31 Barb., 544; Furniss agt. Furniss, 2 Redf., 497*). 6. The petition and order for removal of the trustee are based upon the charge of incompetency by reason of "improvidence and dishonesty," and as there is no evidence of improvidence, and the surrogate had no power to pass upon the question of dishonesty, it follows that the order must be reversed.

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II. The evidence clearly failed to establish the charge of improvidence against the trustee. None was given or offered to show his general character or habits in this respect. The evidence merely tended to show miscalculation or mismanagement on his part, not wanton or reckless improvidence. This point has been expressly adjudged (*Emerson agt. Bowers* 14 *N. Y.*, 449).

III. Nor is there any proof of dishonesty. What is dishonesty? It is clearly something more than improvidence, as defined by the Court of Appeals in *Emerson agt. Bowers* (14 *N. Y.*, 449). And it is something more than misjudgment, mismanagement or misconduct on the part of the trustee. He may mismanage the trust, or misconduct himself, from misapprehension or mistake, and with the best intentions. Dishonesty is equivalent to fraud, collusion and corruption, and implies not only a wrong act, but a bad motive, as the incentive to the act. 1. It was the duty of the appellant as executor and trustee, with general power under the will, to invest and reinvest the personal property; to collect in the personal securities and investments made by the testator in private stocks, and invest the same in real estate securities within a reasonable time, at least within the eighteen months allowed for settling the estate (*Gillespie agt. Brooks*, 2 *Redf.*, 349; 1 *Perry on Trusts*, sec. 440). 2. There is no evidence in this case as to the conduct of the appellant in regard to business generally, as to his general character or business habits for knavery or dishonesty. 3. In determining the question of "dishonesty," it is necessary to take a general survey of his management of the estate, and consider particular acts in the light of his general conduct; in other words, to judge him by his general course of proceeding, and not by a few isolated transactions. The results of such a survey of the management of this trust clearly shows that in the matter of converting the assets into money and reinvesting the same in bonds and mortgages nearly \$9,000 was gained to the estate. Again, the aggregate amount of assets thus converted into money

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and invested in bonds and mortgages, saying nothing of subsequent reinvestments, was over \$138,000, secured by forty-six different securities. Of these investments, there is not a whisper of dissatisfaction in reference to twenty-two of the securities. And there is only a faint murmur against fifteen of the other mortgages, while the evidence is overwhelming to show that they were entirely safe and judicious. The average valuation of all the witnesses, shows that the property in each case was worth from 50 to 100 per cent more than the loss.

4. There are only nine in all of the investments that are seriously attacked, and of these the surrogate has specified six as worthless or inadequate securities. For the evidence relating to these contested securities, their value and the circumstances under which they were taken, and the precautions of the trustees, see preliminary statement of facts. 5. These investments were made during a period of great financial depression, a period of such confusion and uncertainty that real estate can hardly be said to have a settled or market value. There was a continual decline in the value of real estate during all these years, and the lowest point was only reached about the time of this investigation before the surrogate. 6. "A trust is an office necessary in the concerns of life between man and man and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, and it is an act of great kindness in any one to accept it. If there is no *mala fides*, nothing willful in the conduct of the trustee, the court should regard all his acts with a favorable eye" (*Shields* agt. *Shields*, 60 *Barb.*, 61; *Thompson* agt. *Thompson*, 2 *B. Mon. [Ky.]*, 175, 176; *Witner's Appeal*, 87 *Penn.*, 120). 7. No effort was made to show the fees charged by Mr. C. for the services he rendered to applicants for loans, was unreasonable or extortionate.

IV. The surrogate erred in excluding evidence to show what information the trustee received and acted upon in making particular investments, thus shutting off one of the most important, in fact the only way of showing that he acted with

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reasonable and ordinary prudence. The evidence of sales of other property similarly situated, in the immediate vicinity, was material to show the good faith of the trustee in his estimates of the property in question.

Alva H. Tremain and Andrew Hamilton, for respondents.

I. The surrogate had power to remove appellant and to make decree appealed from. (a) The surrogate may remove an executor whom, upon proof, he shall adjudge incompetent to execute the duties of such trust by reason of improvidence or dishonesty and other reasons enumerated (3 *Rev. St.* [6 *ed.*, p. 75], *secs.* 19 to 22; *Redf. Sur. Pr.*, 144; This power is possessed exclusively by the surrogate's court, it being only conferred upon it by statute (3 *Rev. St.* [6th *ed.*], *supra*; *Perry on Trusts*, vol. 1, *sec.* 281; *Wood agt. Brown*, 34 *N. Y.*, 342). (b) And in 1871 was added same power to remove testamentary trustees (*Chap.* 782, *Laws* 1867, *sec.* 1; *chap.* 482, *Laws* 1871; *Redf. Sur. Pr.*, 424, 425; 3 *Rev. St.* [6th *ed.*], p. 106, *sec.* 100; *Hetzell agt. Barber*, 6 *Hun*, 534; *Savage agt. Olmstead*, 2 *Redf.*, 479; *Furniss agt. Furniss*, 2 *Redf.*, 497). (c) These powers may be exercised when the two offices of executor and trustee unite in same person, under one instrument, and a decree removing from both made on the one petition and proceeding (*Wood agt. Brown*, 34 *N. Y.*, 342). Improvidence and dishonesty is sufficient cause for a denial of letters testamentary to one named as executor (3 *R. S.* [6th *ed.*], p. 73, *sec.* 3). And if he becomes such after appointment he can then be removed (3 *R. S.* [6th *ed.*], p. 75, *secs.* 19 to 23). Complaint may be made to the surrogate by any person interested in the trust (3 *R. S.* [6th *ed.*], p. 75, *sec.* 19; *Dayton on Sur.*, p. 644). The constant tendency of the courts and legislation, for a long time, has been to give a liberal and extended construction to the powers and jurisdiction of surrogates' courts. That they should have plenary power for the controlling, preservation and management of estates of deceased persons, and the multiform questions

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appertaining thereto, upon accounting and removal (*Chap.* 272, *Laws* 1860, and *chap.* 115, *Laws* 1866; *chap.* 782, *Laws* 1867, *sec.* 1; *chap.* 482, *Laws* 1871; *Redf. Sur. Pr.*, 424, 425; 3 *Revised Statutes* [6th ed.], *p.* 106, *sec.* 100; *Hartnett agt. Wendell*, 16 *Abb. Pr. [N. S.]*, 383; *Campbell agt. Thatcher*, 54 *Barb.*, 382; *Dobke agt. McClaran*, 41 *Barb.*, 491; *Sipperly agt. Bauous*, 24 *N. Y.*, 46; *Brick's estate*, 15 *Abb.*, 12; *Hetzell agt. Barber*, 6 *Hun*, 534; *Savage agt. Olmstead*, 2 *Redf.*, 478, and *see id.*, 497).

II. The evidence shows the appellant incompetent to execute the duties of these trusts by reason of improvidence. (a) Improvidence is defined as "want of providence or forecast, neglect of foresight or of the measures which foresight might dictate for safety or advantage, not providing for or against what will happen in future time, negligent, thoughtless. Half the inconveniences and loss which men suffer are the effects of improvidence" (*Webster's Dictionary*). And the same, with "neglect of preparation, imprudence, prodigal, wasteful" (*Worcester*). Its synonyms are "inconsideration, negligence, carelessness, heedlessness" (*Webster*). "Providence" (from *pro* and *video*), the want of which, constitutes improvidence, is defined as synonymous with "caution, carefulness, prudence, frugality, economy" (*Webster*). As employed in this statute it has been held to mean "that want of care and foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value" (*Coope agt. Lowerre*, 1 *Bar. Ch.*, 45; *Coggshall agt. Green*, 9 *Hun*, 471; *Emerson agt. Bowers*, 14 *N. Y.*, 449). (b) It is said in *Coope agt. Lowerre*, and also in 14 *N. Y.*, 449, that this imprudence or improvidence must be established as of the habits of mind and conduct, and not based on individual instances. How are they to be shown, when the regular avocation of the party does not necessarily determine them? A good lawyer may be, withal, a very improvident person in financial matters and "management of property," to which

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alone the term improvidence must here be held to apply (*See Coope agt. Lowerre, sup.*). The well-known history of the bar furnishes examples of this truth, both numerous and illustrious. Where the ordinary business occupation of the individual affords no reliable test of his habits and conduct in these respects, the determination of these questions must depend upon the evidence of his capacity and conduct in other fields, which do afford a fair index. The best, the only method left, and we submit it is a most convincing one, is the examination of his conduct and habits during a period of three years, down to the date of these proceedings, in the capacity of sole executor and trustee and manager of an estate of nearly \$200,000, and where full opportunity was given him to display his habits and character of mind, and to make or mar his reputation for providence. (c) The definitions of improvidence, cited above, are those which must interpret its meaning in this statute, inasmuch as there is no distinct or different legal signification. The case of *Emmerson agt. Bowers* (14 N. Y., 449), does not conflict with the respondent's position. It is merely an authority holding that a single act (and there was in that case but one proceeding on the trustee's part shown, being the surrendering up of the control of the trust to the charge of one who, for all that appears in the case, may have been a very competent person), was not the degree of improvidence intended by the statute. That one act of negligence did not sustain the charge of improvidence. The other evidence in that case, such as the taking of the moneys by the trustee himself, and the prosecution of fruitless appeals that the funds might be exhausted in litigation for the attorneys' benefit, were evidence of fraud and dishonesty, not of improvidence; of a wicked purpose, and not an indifferent or incompetent regard; and for these causes the surrogate at that time possessed no power of removal, but has been therewith since invested (*Coggshall agt. Green, supra*).

III. The appellant was incompetent to discharge the duties

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of these trusts by reason of improvidence, as shown by the evidence in — First. He was shown to be improvident in his conversion of the estate and investments left by the deceased, without good cause therefor; also in not dividing the estate into five shares as directed by the will, and which could readily be done when in government, railroad and other first-class bonds and mortgages, and instead of which he destroyed the power of division, owing to the uncertainty of value of new securities and indivisibility of real estate. (a) The will gives express power to sell and invest proceeds of real estate of which testator died seized or possessed. The giving of express power and confining it to real estate of a particular class, and saying nothing as to the personal estate, conclusively shows that the testator was content with his other securities, and did not intend to direct their conversion. The rule is well settled that the naming of one portion of the estate is the exclusion of the other, in the well known maxim, "*Expressio unius est exclusio alterius.*" The will in other places gives him power "to invest and reinvest in good bonds and mortgages," and the funds thus to be applied would be derived from the sale of the real estate as specially authorized, and from securities that should fall due, or be called in, or paid to the trustee, and from any surplus income after support and maintenance of children. The testator's government bonds are, within the law, the safest security, with a certain revenue, inexpensive as to care or collection, untaxed (*King agt. Talbot*, 40 N. Y., 77). These he converted the very first. Of equal security were the first mortgage railroad bonds, drawing six and some eight per cent, some gold, and some in currency. These he converted, leaving stock, a poorer security, unconverted. None of the governments had been called in and most were not due until 1887, consequently their sale, and that of the others was in violation of his powers under the will. If it is said, he considered himself as commanded by the will to sell the securities and invest in bonds and mortgages, he has been further derelict, for he has never attempted to carry out that direction by dis-

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posals of the remaining securities, of about \$38,000, left by the testator, and which might, with more propriety, have been disposed of. If the direction of the will was positive, he was bound to convert all (*Tiff. on Trusts*, 629, 630, 632). (b) The will at most, in regard to converting securities, is but permissive. When there is no command directing the conversion, the trustee must act in utmost good faith, and, though power is given him in his discretion, it will not authorize a change with a prospect of benefiting the estate (*Tiffany on Trusts*, 614, 615, 78, 79; *Perry on Trusts*, vol. 1, sec. 466). If unauthorized by the will, the trustee's acts were a wrongful conversion. If allowed by the will, being without a prospect of benefit to the estate and for his own gain, it was equally improvident. If directed by the will, his failure to invest in good bonds and mortgages was equally a violation of his powers most improvident in its character. Second. The appellant by his investments showed himself incompetent by reason of improvidence. (a) It was his duty as trustee to see that the investments were secure, productive of interest, and subject to future recall (*Ackerman agt. Emmott*, 4 *Bar.*, 626; *King agt. Talbot*, 40 *N. Y.*, 76, 86, 88; *Affirming same case*, 50 *Barb.*, 453, 484; *Tiffany on Trusts*, 587, 600, 601, 602, 603; *Ackerman agt. Emmott*, 4 *Barb.*, 626; *Smith agt. Smith*, 4 *John. Ch.*, 281; 4 *Edw. Ch.*, 718). From, as we claim, illegal conversion of first-class securities of about \$107,000 invested, but about \$32,000, on January 21, 1878, were paying investments. The balance yielded not more than sufficient income to discharge the expenses of their own management. The principal has been exhausted in their maintenance to \$7,119.66. The interest was lost instead of being secured; the principal was sunk in unproductive, and in several cases, in entirely worthless real estate, so it cannot be recalled as the law requires (40 *N. Y.*, *supra*). (b) The investments made are in nearly every case largely in excess of the amount that is sanctioned for trust loans by the law. A trustee should not loan more than one-half to two-thirds of

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the value of the property (*Bogart agt. Vanvelsor*, 4 *Ed. Ch.*, 718-22, 23; 40 *N. Y.*, *supra*; *Day. on Sur.*, 522). It may be improper to loan even two-thirds or one-half where buildings are used for trade (*Perry*, vol. 1, p. 549, sec. 457; *Lewin on Trusts* [6th ed.], 286). As when, as in this case, loans are made on a falling market. (c) A trustee should never loan on second mortgage (*Perry on Trusts*, vol. 1, p. 550, sec. 457; *Lewin on Trusts* [6th ed.], p. 291, sec. 40). (d) The law requires of a trustee that attention which a provident man should pay to business. It was improvident, therefore, being without experience himself in values, that he did not have some competent person estimate the value of each piece of property before placing the loan (3 *Red. on Wills*, 554, secs. 118 a, 559; *Perry on Trusts*, secs. 441, 442, 443, 444, vol. 1, p. 532, &c.; *Tiffany on Trusts*, secs. 570, 571; *King agt. Talbot*, 50 *Barb.*, 454, 484, 485). If trustees rely upon a valuation made by the mortgagor, or a surveyor, who is his agent, without having a survey of the value on behalf of the estate, it is a breach of trust; and they will be held liable for any deficiency in the value of the security (*Lewin on Trusts* [6th ed.], p. 286, sec. 25). Nor must he employ the solicitor of the borrower to fix upon the value or survey (*Lewin on Trusts* [6th ed.], p. 279, sec. 59). (e) Further evidence of appellant's incapacity by reason of improvidence from his investments, is in his making loans in a manner which might even leave them open to the objection at least of usury, thereby entailing difficulty and expense in their collection, litigation and delay. Results which were naturally to be expected in all, and did actually occur in some. This was conduct liable to render the estate unsafe and likely to be lost or diminished, and therefore within the statutory definition of improvidence (*Coope agt. Lowerre*, *supra*). It is no answer for the appellant to charge these derelictions upon C.; he knew of them, participated, allowed and encouraged them, and a trustee cannot give funds to a solicitor, and allow him to misapply them and then escape

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responsibility (*Brown's Accounting*, 16 *Abb.* [*N. S.*], 457 and 466, and numerous cases cited; *Tiffany on Trusts*, 597, 570; 3 *Redf. on Wills*, 547, 548; *Perry on Trusts*, vol. 1, sec. 402).

IV. What proof would show that the appellant was incompetent to discharge the duties of this trust by reason of dishonesty? (a) Dishonesty as applied to persons is defined as, "Want of honesty, a disposition to deceive or betray, violation of trust, fraud, any deviation from probity or integrity" (*Webster, Worcester*). All actual fraud is dishonest, and fraud, though unlimited by any precise definition, is any deception or artifice used to circumvent, cheat or defraud another (*Story's Eq. Jur.*, vol. 1, sec. 186). Embezzlement is clearly dishonesty, and the neglect or refusal of an assent to account for trust property is embezzlement (*State agt. Leonard*, 6 *Cold.* [*Tenn.*], 307). So is the giving of a false account, or the willful omission to acknowledge receipts by a trustee or agent, and therefore dishonest (*Rex agt. Jones*, 7 *Car. & P.*, 834; *U. S. agt. Forsyth*, 6 *McLean*, 584; *Bachelor agt. Tenney*, 27 *Vt.*, 578). That whatever would constitute fraud would stamp its perpetrator as guilty of dishonesty, is a self-evident proposition. Fraud, says *Story* (vol. 2 *Eq. Jur.*, sec. 187), properly includes all acts, omissions and concealments which involve a breach of legal and equitable duty, trust or confidence (*See, also, Bouv. Dict.*, vol. 1, p. 612, title "*Fraud*;" *Perry on Trusts*, vol. 1, sec. 169, *et seq.*; *Gale agt. Gale*, 19 *Barb.*, 249-251; *Conkey agt. Bond*, 34 *Barb.*, 276; *Gould agt. Gould*, 36 *Barb.*, 270; It is the unlawful appropriation of another's property with knowledge, by design and without criminal intent (*Bouv.*, vol. 1, p. 612). It must be such an appropriation as is not permitted by law, with knowledge that the property is another's and a design to deprive him of it. It is not in itself a crime, though it may be. (*Bouv. Dic.*, sec. 4, p. 613). Dishonesty need not be criminal any more than fraud (*Livermore's Penal Law*, 739). It is indeed a part of the equity doctrine of fraud not to define it, or lay down specific rules as to the nature of

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it, lest the craft of man should elude the rule. But it includes all acts, omissions or concealments which involve a breach of trust and is injurious to another (*Bouv. Dic.*, p. 613, *sub.* 7, *vol.* 1). Dishonesty bears no resemblance to the word improvidence, as used here in the statute, in the necessity that it should characterize the trustee's conduct in general. One dishonest act, however, is sufficient evidence of moral obliquity. One unmistakably intentional wrong, intending individual gain by unfair means at another's expense, would be clear evidence of that evil propensity and purpose which the law rightly deems it unsafe and injudicious to countenance in the character of trust custodians. No one could deny that the person acting so was guilty of dishonesty. This word does not even require that there should be a criminal intent (*Bouv.*, *supra*). A man is said to be honest who in his dealings with others does not violate the law (*Crabb's Synonyms*, 427). Dishonest marks the contrary to honest. It is dishonest to take anything from another which does not belong to one (*Id.*, 430). The meaning of dishonesty employed in this statute being manifest.

V. The appellant was incompetent to discharge the duties of this trust by reason of dishonesty, as appeared by the evidence. First. He was so proved to be in the matters of his conversions of the estate and investments as left by the deceased. The conversion of government bonds for investing on grossly insufficient security for bonus, was so manifestly a conversion of the highest security for corrupt motives, and solely for his own gain, regardless of the security of the trust fund, that it was dishonest and a violation of trust, a deviation from integrity, a circumvention of the objections to direct appropriation of the trust moneys in an illegal manner. Second. The appellant was shown incompetent by reason of dishonesty in his investments. Third. The appellant was shown incompetent for the same reason, by his conspiracy with his partner to retain the moneys belonging to the trust estate. The appellant and C. conspired to and did retain the

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moneys of the estate to which they were not entitled. These amounts which were taken as bonuses were really the moneys of the estate which had never been invested. They never left the hands of the appellant and his partner who was given the money to "invest," &c. In each case they took their moneys out of the fund that was to be loaned, so that in fact it never was loaned, but remained the money of the estate in their hands. In every one of these cases the bonuses belongs to the estate (*Perry on Trusts*, secs. 429, 430, vol. 1, p. 517). Now if the appellant had taken over \$7,000 from the estate and divided it between himself and Case, without any formality, he would be clearly dishonest and guilty of embezzlement. If he had taken it and pretended to give security that was no security, he would be in no better position as regards this appeal. Several of his loans were absolutely worthless, so glaringly so that he must have known thereof. The proof of a reckless conspiracy is strong and conclusive and establishes his dishonesty (*Gale agt. Gale*, 19 *Barb.*, 249, 251). If a trustee is guilty of a gross neglect of his duty to the estate, he will be deemed guilty of a breach of trust (*Tiffany on Trusts*, 570, 571). A willful breach of trust is dishonesty. Fourth. The appellant was shown incompetent for the same dishonesty in the taking of usury. The taking of these bonuses even by a trustee (sole) was usurious (*Van Wyck agt. Walters*, 16 *Hun*, 209; *Stout agt. Rider*, 12 *Hun*, 574; *Algur agt. Gardner*, 54 *N. Y.*, 360; *Estevez agt. Purdy*, 66 *N. Y.*, 446; *West. Life Ins. Co. agt. Kashan*, 66 *N. Y.*, 545; *Lee agt. Chadsey*, 2 *Keyes*, 543). Here the trustee in many cases took half of the bonuses and kept it without any cover whatever, and in the balance of the cases he kept nearly half by having it paid on liabilities against him which he would otherwise have had to pay himself, and hoped and expected to get the balance to make up his half of the entire bonuses. The taking of usury is a crime and the receiver is a criminal (2 *R. S.* [6th ed.], p. 1166, sec. 15). The maxim "*ignorantia juris non excusat*" need not be invoked, for the appellant was

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himself a lawyer and betrayed a knowledge of this rule by his attempts to avoid the consequences. It remains for the trustee to explain these transactions. He has not done so. They were presumptively fraudulent (*Evans* agt. *Ellis*, 5 *Denio*, 640; *McCormack* agt. *Malin*, 5 *Blackf.*, 509, 523; *Dunlap's Paley*, 36; *Newman* agt. *Cordell*, 43 *Barb.*, 448; *Waverly Nat. Bank* agt. *Halsey*, 57 *Barb.*, 249). The taking of usury is an infamous crime, severely condemned by the laws both Divine and human. Its deliberate and professed violation cannot be other than dishonest. He has admitted the taking and division of these illegal bonuses in thirty-one different cases, and it has been proven in ten other cases, thus making forty-one mortgages where usury could be pleaded, amounting to \$107,629.33. If it is a crime to take usury in loaning your own money how much the more criminal and dishonest it must be to lend or take usury upon loans made from trust moneys upon which the widow and five infant children of the deceased depend for their support and for the necessities of life. This is dishonesty of the worst character, and for which alone, if for no other reason, he should have been removed. Fifth. The appellant was shown incompetent by reason of his dishonesty in concealment of these bonuses received and divided between himself and C. of over \$7,000, which belonged to the estate and should have been included in his accounts. As we argued above, they were funds of the trust which had never changed their character or been invested. (a) A trustee will not be permitted to make profit for himself out of the trust property; and he is equally prohibited from purchasing or dealing with it for his own gain (*Colburn* agt. *Morton*, 36 *How.*, 150-160, *Court App. and cases*; *Same Case*, 5 *Abb. [N. S.]*, 308-316, *Court App.*; *Littlye* agt. *Beveridge*, 58 *N. Y.*, 592-606; *Fulton* agt. *Whitney*, 5 *Hun.*, 16; 3 *Red. on Wills*, 402, 403-553; *Story's Equity Jur.*, sec. 1277, a; *Levin on Trusts* [6th ed.], p. 243; *Van Epps* agt. *Van Epps*, 9 *Paige Ch.*, 237; *Kellogg* agt. *Wood*, 4 *Paige Ch.*, 578; *Holloway* agt. *Stevens*, 48 *How.*, 129). One who joins with him is also

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disabled (*Sweet agt. Jacobs*, 6 *Paige Ch.*, 355). An usage authorizing an agent to make a profit upon his principal is a usage of fraud and plunder, and cannot be supported (*Diplock agt. Blackburn*, 3 *Campb.*, 43). A subordinate or agent of trustee is equally disqualified from making gains out of the estate, where it is to be shared in any way by the trustee (*Terwilliger agt. Brown*, 44 *N. Y.*, 237-240, 241, *affirming* 59 *Barb.*, 9; *Hawley agt. Cramer*, 4 *Cow.*, 717). Nor can the trustee or executor give it to one and then take back a part to himself. (*Powers agt. Powers*, 48 *How.*, 389). If he charged a bonus in his account for skill and services in conducting the business of the trust it will be set aside (*Perry on Trusts*, vol. 1, secs. 427, 428, 429, and vol. 2, sec. 904). No profit can be made by them for increase (3 *Rev. Stat.* [6th ed.], sec. 70, p. 101). Nor can his partner make any profits out of the trust funds, or for the performing of services, unless the partner alone takes the profits. Nor can either charge for professional services where both would share in the proceeds (3 *Redf. on Wills*, 556, sec. 118; 3 *Redf. on Wills*, 416, note; *Collier agt. Munn*, 41 *N. Y.*, 143, 146; *Perry on Trusts*, vol. 1, p. 520, 521, sec. 432; *Lewin on Trusts* [6th ed.], p. 249, sec. 15 and p. 243). Whether usurious or not the trustee must account for all gains (*Perry on Trusts*, vol. 1, p. 571, sec. 468; 3 *Redf. on Wills*, 406, sec. 18). The rule in England and America is that a trustee must account for all profit he has made (3 *Redf. on Wills*, 402, sec. 10, 11; 403, sec. 12; 406, sec. 18; *Utica Ins. Co. agt. Lynch*, 11 *Paige Ch.*, 520). Trustee cannot even charge costs in an action against him personally for acts arising out of his attempts to protect trust property (*Pierson agt. Thompson*, 1 *Edw. Ch.*, 212). All these bonuses should have been accounted for and were property of the trust (*Perry on Trusts*, vol. 1, sec. 427, 428, 429, 430, and sec. 468, p. 571; *Tiffany on Trusts*, 554, 555, 556, 557, 558). (b) Being the moneys and profits of the trust, appellant refused to include them in account, appropriating them to his own use. His accounts, as filed in this

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respect, were false. His omissions were willful. Failing to account for these receipts and convertly using them for himself and partner, was embezzlement and was dishonest (*Rea* agt. *Jones*, *supra*, p. 40; *U. S.* agt. *Forsyth*, *supra*, p. 40; *Bachelder* agt. *Tenney*, *supra*, p. 40). This comprised thirty-two different items, total \$7,400.31; each item retained was a dishonest act, in taking, in concealing, in using and in refusing to account for and pay over. Seventh. Every department of the appellant's administration as it proves him incompetent by reason of improvidence, shows like proof of his dishonesty. These delinquencies are linked together. His improvidence in conversions, loans and investments, in selling good securities and taking poor or worthless mortgages afforded the opportunity for his dishonest practices and gains. None other would. It was because of his improvidence in loaning that borrowers who were receiving more than the entire value of their security could afford to give appellant and his partner the excess as payment of the large bonuses they exacted, and the evidence of Savage's improvidence is the source and center of his dishonesty. This case comes before this court for review upon the merits. Was this removal justified by principles of equity, is the question? This is in the nature of a rehearing in equity (*Robinson* agt. *Raynor*, 28 *N. Y.*, 494; *Gilman* agt. *Gilman*, 3 *Hun*, 22, and cases cited, p. 25; *Kyle* agt. *Kyle*, 4 *N. Y. Weekly Dig.*, 120; *Sup. Court Rules*, No. 42, note 12; *Redfield Pr. Sur. Court*, p. 465).

BOARDMAN, *J.*—Edward Savage was removed by the surrogate of Albany county as executor and trustee under the will of John Gould, deceased, because he was "incompetent to discharge the duties of such office as executor, and such trust as trustee, by reason of improvidence and dishonesty in the administration of said trusts, office and estate."

The mass of evidence and the conceded facts are conclusive against the said Savage. He is shown to be incompetent in that he has delegated to others the judgment and discretion

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which, by his acceptance of the trusts, was due from himself. He has allowed his law partner to manage the trust estate for his own benefit. He has taken second mortgages in violation of his duty as executor and trustee. He has taken inadequate security, when ordinary care, judgment and competency would have protected the estate. He has converted the best of securities to invest in the poorest bonds and mortgages.

These acts and others which might be recited, convict Savage of incompetency to administer upon such an estate or discharge such trust duties. The funds in his hands are wasting away through his negligence, carelessness and ignorance, or dishonesty and improvidence.

There is additional evidence which satisfied the surrogate of his dishonesty. He has used the trust funds to secure his own profit, and has sought, by means condemned by law, to secure a pecuniary benefit to himself. He has charged to borrowers a bonus or commission on sums loaned, and put the same, or a part thereof, into his own pocket. He has exposed the securities taken, to the suspicion of usury; not to the benefit of the estate, but himself. The estate has been managed for his own benefit, and he has deliberately made a profit out of it, when the making of such profit or gain exposed the estate to the greatest risks of loss, some of which have already occurred, and many of which will in all probability ensue. His reckless improvidence, his incompetency, and his acts outside of the sanction of the law, have involved the estate in litigation and charged it with costs. Litigation and costs must almost inevitably ensue in many other cases in the future.

This court is satisfied the charges for which Savage was removed by the surrogate are abundantly sustained by the evidence. The interests of the estate and of the *cestui que trust* demand his removal. A continuance of the conduct of Savage in the future, as in the past, could only result in remediless disaster to the estate and the beneficiaries. Entertaining these views, we concur upon the merits that Savage was justly removed from his offices as executor and trustee.

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It is urged, however, upon this appeal that the surrogate had no jurisdiction to remove Savage from his position as testamentary trustee for dishonesty. It is conceded that the surrogate could remove him for incompetency.

We have already shown that he was incompetent, in our opinion, to exercise these trusts. That incompetency is not shown in one or two isolated instances, as in *Emerson agt. Bowers* (14 N. Y., 449), but by a long series of reckless, improvident and foolish acts to the serious danger and detriment of the estate. We might safely stop here, and upon this ground alone sustain the surrogate's decision.

But it seems quite clear, also, that the learned surrogate was correct in considering the evidence of dishonesty and including that in the reasons for his removal.

As the law existed in 1871, the surrogate could have removed an executor when "he had become incompetent to serve." At that time (1871) power was given him to remove testamentary trustees "in the same manner as now provided" for the removal of executors (1 *Laws of 1871*, p. 1010). By chapter 79 of Laws of 1873, page 159, the Revised Statutes were amended so as to include dishonesty in the cases for which an executor might be removed from office. The amendment of 1873 did not affect the manner in which an executor could be removed. That remained the same as before. It added another cause for removal, and therefore the Revised Statutes included such cause for removal, which was equally applicable to executors, testamentary trustees or guardians. The amendment modified the statute as of a date prior to 1871, so that the power to remove testamentary guardians under the act of 1871 could be exercised in case of incompetency by reason of drunkenness, dishonesty, improvidence or want of understanding. The authority to remove is only found in the act of 1871, but the cases in which the power might be exercised were within the province of legislative amendment. An amendment of the Revised Statutes, under such circumstances, causes the act of 1871 to take

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effect in virtue of the amended law, and be controlled by it as so amended. Such seems to us to be the purpose of the two statutes and the natural object of the legislature (*Dawson agt. Horan*, 5 Barb., 459).

It is not necessary to consider the exceptions taken upon the hearing. There is no substantial conflict in the evidence. The inferences from it are irresistible. There can be no two opinions as to the facts established. Whether they constitute evidence of incompetency by reason of dishonesty or improvidence may, perhaps, be debatable, though we do not hesitate in our own opinion in that respect. Hence these rulings now complained of could not, by possibility, have changed the result or lead to the establishment of facts at variance with those concededly established by the case.

We think the decree of the surrogate is just, and should be affirmed, with costs against Edward Savage personally (*Same agt. Same*, No. 132 on calendar.)

This case presents the same identical questions upon the removal of Savage as guardian, and upon the same evidence.

The decree in this case is also affirmed, with costs against Edward Savage personally.

SUPREME COURT.

EDWARD SAVAGE, as executor, &c., agt. MARY L. GOULD *et al.*

Costs on appeal from surrogate's court — Separate appearance and bill of costs to infant respondents.

Upon an appeal to the supreme court from the decree of the surrogate removing an executor and guardian, it is proper that infant respondents should appear by different attorney than adults and tax separate bill of costs, upon affirmance.

From the service of the petition of appeal, the proceedings, so far as the question of costs were concerned, are to be regarded in this court, viz., costs of proceedings, before and after trial, of argument and term fees. Code of Procedure, section 307, not applicable to such appeals.

Troy Special Term, March, 1880.

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Charles W. Mead, appellant's attorney, for motion for retaxation. But one bill of costs can be taxed, unless more are awarded (*Code*, sec. 306; *Williams* agt. *Blumer*, 49 *How. Pr.*, 12; *Allis* agt. *Wheeler*, 56 *N. Y.*, 50; *Park* agt. *Spaulding*, 10 *Hun*, 128-131; *Von Keller* agt. *Schulting*, 45 *How. Pr.*, 139; *Brockway* agt. *Jewett*, 16 *Barb.*, 594). Trial fee only was allowable (*Morgan* agt. *Morgan*, 1 *Abb. [N. S.]*, 40).

Alva H. Tremain, attorney for adult respondents; *Andrew Hamilton*, attorney for infant respondents, opposed. The Code does not limit the costs to trial fee, but places the appeal "for all purposes of costs" as an action in this court (*Code*, sec. 318; *Dupuy* agt. *Wurts*, 47 *How. Pr.*, 225; *Seguin* agt. *Seguin*, 3 *Abb. Pr. [N. S.]*, 442; *Morgan* agt. *Morgan*, *supra*; and *Gilman* agt. *Reddington*, 4 *Hun*, 640 explained; see note after opinion). Separate bills of costs were properly taxed (*Conkling* agt. *Bloodgood*, 12 *Wend.*, 279; *Minturn* agt. *Main*, 2 *Sandf.*, 737; *Bridgeport Ins. Co.* agt. *Wilson*, 20 *How. Pr.*, 511). The guardian necessarily appeared and pleaded separately (*Sup. Ct. Rule* 53). The award of costs means to all parties who succeed (*Lawrence* agt. *Lindsay*, 70 *N. Y.*, 566; *Sisters, &c.*, agt. *Kelly*, 68 *id.*, 628).

INGALLS, *J.* — In the above matter the adult respondents appeared by Mr. Tremain, and the infants by Mr. Hamilton, as their guardian *ad litem*. The decree of the surrogate was affirmed by the general term with costs. Tremain and Hamilton are not partners, nor in any manner connected in business, nor do they occupy the same office, and there is no claim of collusion or of a device to insure the costs of litigation by their separate appearances. It was quite proper that the infants should be represented by a person other than the attorney for the adult parties. Under such a state of facts it was justifiable to allow the two bills of costs, and herein the clerk, in this respect, committed no error in adjusting them

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(*The Bridgeport F. & M. Ins. Co. agt. Wilson*, 20 *How. Pr.*, p. 511 ; *Cullomb agt. Caldwell*, 5 *How. Pr. Rep.*, p. 336). As all of the respondents were successful, it did not become necessary to apply to the court for direction in regard to an allowance of costs under subdivision 2, section 306, of Code of Procedure. The court at general term, by its order of affirmance, allowed costs to the respondents without restriction ; and, hence, we conclude that they were to be adjusted according to the rules and practice of this court. The item of ten dollars for preparing amendments to the return, on the appeal, was unauthorized and should not have been included in the costs, as section 307 of the Code of Procedure does not apply to such a case, and as the court had not by its order directed payment for that service, it cannot be included in costs. From the time of the service of the petition of appeal, the proceeding so far, at least as the question of costs are concerned, is to be regarded in the supreme court (*Dupuy agt. Wurts*, 47 *How. Pr.*, p. 225 ; *Sequine agt. Sequine*, 3 *Abbott's Rep. [N. S.]*, 442 ; *Hawley agt. Donnelley*, 8 *Paige Chan. Rep.*, 415). Consequently it was proper to include the item of ten dollars for all proceedings before notice of trial, also the item of fifteen dollars for all proceedings after notice and before trial. We perceive no substantial reason why those items should not be allowed, as the nature of the services rendered is consistent with the provision of the Code in that respect. The appeal necessitated the trial of an issue of law, and hence the successful party became entitled to a trial fee of twenty dollars. The argument of the appeal was postponed, at the instance of the appellant and by order of the court, one term, and therefore the term fee of ten dollars was properly taxed. The adjustment of costs by the clerk seems to have been correct with one exception, viz., the item of ten dollars for preparing amendments. The costs must be readjusted in accordance with the foregoing ; and no costs of this appeal is allowed to either party.

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SUPREME COURT — SAME TERM.

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| EDWARD SAVAGE, AS GUARDIAN, | } |
| agt. | |
| MARY L. GOULD <i>et al.</i> | |

INGALLS, *J.* — This appeal was voluntarily submitted and decided by the court at general term, and costs were awarded to the respondents upon affirmance. We conclude that the same rules must apply in regard to costs as in the case first above considered.

NOTE. — *Gilman* agt. *Reddington* (4 *Hun*, 640, opinion not reported) is not properly stated in head note. In that case the items for proceedings before and after notice were taxed, and it was admitted by the appellant, in his points and upon the argument, that they were proper. The question therefore was not before the court as to those items, and the same explanation applies to the case of *Morgan* agt. *Morgan* (1 *Abb. Pr.* [N. S.], 40. [REP.]

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF THOMAS MURPHY
FOR A MANDAMUS.

Comptroller of State — his duties under the acts of 1873 and 1879, as to bill for services of appraiser, appointed by superintendent of insurance department, which bill has been approved by said superintendent.

The relator, an appraiser duly appointed by the superintendent of the insurance department, having presented an itemized bill for services as such appraiser, which bill was approved by said superintendent, the duties of the comptroller of the state, under the acts of 1873 and 1879, requiring him then to audit such bill were confined to an examination for the purpose of seeing whether the preliminary steps required by law had all been taken; and he had no power arbitrarily, and on his own sense of right and justice, either to increase, decrease or reject the bill altogether, because the charges as made did not meet his approval.

Albany Special Term, 1880.

Matter of Murphy.

APPLICATION for a *mandamus* against the comptroller of the state of New York to compel him to audit a bill as approved by the superintendent of insurance.

Edward Newcomb, for Murphy.

Matthew Hale, for the comptroller.

WESTBROOK, J. — On the sixteenth day of October, 1877, Thomas Murphy was appointed by John F. Smyth, the then superintendent of the insurance department, under the provisions of chapter 593 of the Laws of 1873, an appraiser of the real estate covered by mortgages owned by The Manhattan Life Insurance Company of New York, situate in the counties of New York, Kings, Richmond and Suffolk. Mr. Murphy accepted the appointment, discharged its duties, and then presented an itemized, detailed and full bill to the superintendent of insurance, who approved the same. Such itemized and approved bill was then presented, on March 17, 1879, to the comptroller of the state, Frederic P. Olcott, for audit, who reduced the bill from \$9,800, at which it had been approved by the superintendent of insurance, to \$720, and refused to audit the same as approved.

Mr. Murphy declined to accept the bill as audited by the comptroller and re-presented the bill, itemized and approved by the superintendent of insurance, to the present comptroller, James W. Wadsworth, who has also refused to audit the bill as approved. Mr. Murphy now asks for a *mandamus* to compel him to perform that alleged duty.

There are no allegations of fact which are contested or disputed. The application turns entirely upon the powers of the comptroller under the statute, and its language must be clearly in mind previous to any discussion.

Chapter 593 of the Laws of 1873, section 2, provides: "All charges for making examinations of any insurance company, and all charges against any company by any attorney

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or *appraiser* of this department shall be presented in the form of an itemized bill, which shall *first be approved* by the said superintendent and *then audited* by the comptroller, and shall be paid on his warrant," &c.

The act of 1879 (*chap. 161, sec. 2*) has made no change in this particular. That reads, "The expense of any examination made under this section shall be borne by the company whose affairs are so examined, to be paid by the company to the state treasurer, after being *approved* by the superintendent of the insurance department and *audited* by the comptroller."

It will be observed that the law requires the following steps to be taken: 1st. An appointment by the superintendent of the insurance department. 2d. The performance of the services by the appointee. 3d. The presentation of "an itemized bill" for all charges for services rendered under the appointment. 4th. That the "itemized bill * * * shall *first be approved* by the said superintendent"; and 5th. "*Then audited* by the comptroller."

The question is not, what may sometimes be involved in the use of the words "audit," "audited" or "auditor," but it is, in what sense is the word "*audited*" used in this statute?

The word, in its primary sense, implies a hearing. If an account is referred to an officer for audit, and no provision is made in the reference for the ascertainment of its justice prior to its examination by the auditor, then, of course, it is such officer's duty to give the matter a full hearing or examination, and decide every question upon its merits. If, however, a tribunal is created for the examination of the bill, and for its rejection or approval prior to its audit by the officer to whom it is referred, then the hearing or examination by such officer is not upon the whole merits of the bill, but it must be limited and confined to an inquiry whether the previous steps required by law have all been duly and regularly taken.

In the case now presented, the officer making the appointment — the superintendent of insurance — was required to

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examine an "itemized bill" for the services rendered, which, before its presentation to the comptroller, had to be "first approved by the said superintendent." This was a reasonable requirement of the law, for that officer is presumed to be acquainted with the nature and value of the services rendered. After such approval by the superintendent it is declared, that it must be "then audited" by the comptroller. What does this require of the last named officer? To go over each item of the bill, and raise or reduce it according to his ideas of the propriety of the charge and its value? If he may go over the items of the bill in such a manner, why may he not then also go further and inquire whether the appointment of the appraiser should ever have been made and the services rendered at all, and if in his judgment there should have been no examination of the affairs of the company, reject the bill altogether? Certainly, if the comptroller, because he is authorized to audit the bill, is empowered to examine into the justice of the charges, then he may also determine the whole claim to be unjust and wrong, even though the services were rendered in obedience to law, upon the regular appointment of an officer authorized to make it. No such construction of the act is, in my judgment, admissible. As a mode of ascertaining and fixing the amount of the charges before the bill was presented to the comptroller for audit, was provided by the statute, the latter's duties in the auditing thereof were confined to an examination for the purpose of seeing whether the preliminary steps had all been taken, and he had no power, arbitrarily and on his own sense of right and justice, either to increase, decrease or reject the bill altogether, because the charges as made, though "itemized" and "approved" as the law directed, did not meet his approval. It would be just as proper for an auditing officer to refuse to allow a judgment recovered in due course of law, because, in his opinion, it ought never to have been rendered.

The view just presented is not novel, but has been frequently adopted when the auditing tribunal was required to

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act upon a claim previously ascertained in a mode prescribed by law.

The People ex rel. Hoyt agt. *The Supervisors of the County of Kings* (16 Wend., 520), decided by the court of errors, is directly in point. By section 53 of chapter 55 of Laws of 1830, entitled "An act regulating highways and bridges in the counties of Suffolk, Queens and Kings," it was provided, when a road had been laid out by the commissioners of highways, that "such commissioners shall cause a statement of the verdict, charges and expenses in laying out the said road, to be delivered to the supervisor of the town, who shall lay the same before the board of supervisors of the county, by whom the same shall be *audited*." The land of the relator had been taken for a highway and his damages assessed at \$1,450. On the presentation to the board of supervisors under the section just quoted, the matter was referred to a committee, which reported that a much less sum should be awarded to Hoyt. The board of supervisors relied upon the *People ex rel. Patchen* agt. *The Supervisors of the County of Kings* (7 Wend., 530), in which case the same meaning given to the word "audit" as that adopted by the comptroller in this, was held to be proper. This view was also sustained by the supreme court, but was reversed by the court of errors, twenty-four members of that tribunal voting therefor, and only one voting to affirm.

In *Morris* agt. *The People* (3 Denio, 382), it was held, "When the board of supervisors of a county are required by law to *audit* and allow the accounts of judicial officers for their salaries, they have no discretion to exercise, but must allow the salary as fixed by law" (*See opinion of Lott, Senator, on pages 400, 401, 402*).

The same view of the meaning of the word we are considering must have been adopted by the court of appeals in *The Amoskeag Manufacturing Company* agt. *The Mayor of Albany, &c.* (63 N. Y., 37). The case, though not fully reported, was as follows: By chapter 197 of Laws of 1867,

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entitled "An act to reorganize the fire department of the city of Albany," it was declared (*sec. 5*): "The chamberlain of the city of Albany shall *audit* and pay the bills contracted or incurred by said board of fire commissioners under the provision of this act, upon production of their warrant therefor," &c. The fire commissioners had contracted for repairs to the amount of \$1,687.05, and had passed and approved the amount at that sum. The city chamberlain, supposing the word "audit" to mean what the comptroller on his proceeding claims for it, examined the bill upon its merits, and reduced it \$300. The plaintiff refused to accept the audit and brought suit to recover the whole amount. In that action a judgment for the full sum, as fixed by the fire commissioners, was rendered upon the report of a referee, which was affirmed at general term and in the court of appeals. The case filed in the state library discloses the facts stated.

Other decisions of a similar character can doubtless be found, but those cited are sufficient to sustain a proposition clear without them. In fact it seems to me that the learned counsel for the comptroller concedes the whole case, when he says in his brief: "The result of the cases in this state would seem to be, that where the amount of the bill to be audited is fixed by law, *or where the amount is by law to be fixed by some other than the auditing officer as by the jury in the case in 16th Wendell, or by the board of health as in the case in 9th Wendell, or by fire commissioners as in the case in 63d N. Y., then the auditing officer will not only be required to audit and allow, but to do so at the amount fixed by law, or by the authority to which the power to fix is delegated by law.*" Precisely this is the case presented. The approval of the bill is to be by the superintendent, the officer who ordered the services, and not by the officer who was simply to "*audit.*" There was no discretion committed to the comptroller. Of the services he could have no personal knowledge, and he was powerless to investigate. The bill should come to him after investigation and approval in the

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mode prescribed by law, and whether it did or not he could decide, but beyond this he could not go.

An order must be made requiring the comptroller to do his duty under the law, in conformity with the principles herein enunciated. That his predecessor has taken the same view of his power that he does, is no justification to him. The obligation to audit rests upon the individual holding the office of comptroller, without regard to the personalty of the incumbent. The failure to take this proceeding against his predecessor is no bar to this application, for if it was, the refusal to perform a plain duty by the possessor of the office during the last day of his term would then be a perpetual bar.

If the comptroller desires a stay to enable him to review the order to be made hereunder, it will be granted on the application of his counsel.

SUPREME COURT.

MATTER OF OPENING SIXTY-SEVENTH STREET.

Street openings in New York City—Dedication—Boundaries—Power of Executors to dedicate—Excessive awards.

Where an owner of land through which a public street is laid out, in conveying portions of such street makes the street a boundary, the grantees are entitled to the use and enjoyment of the street for that purpose as an easement or servitude to the property granted.

Where land is granted bounded upon a street or highway, there is an implied covenant that there is such a way, and that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it.

By bounding land conveyed by the side of a street or highway, the land in the highway is excluded by force of the description so used, and does not pass to the grantee.

Executors acting under a power or trust to sell real estate conferred by will, may lawfully dedicate to public use that portion of the land of the testator within the lines of a proposed street as incidental to the sale of the land in lots or otherwise on each side of the street.

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The power to divide and lay out in lots and streets the land of the testator, is a necessary incident to a power given to executors to sell and dispose of it to the best advantage.

An owner of a tract of land in the city of New York, by conveying a portion thereof bounded upon a street, dedicates the street not only to the next intersecting avenue, but as far as the same extends through or is laid out over his land.

Upon the coming in of the report of the commissioners of estimate and assessment, the court will examine the testimony submitted to them as to the value of property to be taken for the street, and if it appears that the amounts awarded are greatly in excess of the real value of the property, the report will not be confirmed.

New York Special Term, January, 1881.

MOTION to confirm the report of the commissioners of estimate and assessment.

William C. Whitney, counsel to corporation, for the mayor, &c.

Henry H. Anderson, for W. C. Schermerhorn and another, for the motion.

Frank E. Blackwell, for the devisees of Smith Bloomfield, deceased, for motion.

James A. Deering, for New York Loan and Improvement Company, opposed.

John C. Shaw, for I. Sternberger, opposed.

James M. Fitzsimmons, for Ann Cassidy, opposed.

DANIELS, J.—The street, which it was the purpose of these proceedings to open, was laid out and delineated upon maps filed by the commissioners appointed for that purpose under chapter 115, Laws 1807.

The legislature, at that time, anticipating the future extension and growth of the city, made provision by this act for

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laying out streets over a portion of its territory for the purpose of definitely fixing their location, and enabling the owners of the property to occupy, enjoy and deal with it in view of the future opening of such streets. The maps of the commissioners were, one of them, required to be filed in the office of the clerk of the city and county of New York, and the other to be at the disposal and use of the mayor and aldermen of the city. By the act making these provisions, the work assigned to the commissioners was to be completed within the period of four years (*Laws* 1807, 126, *sec.* 3), and sufficient appears in the case to warrant the conclusion that they complete what was required by this law in the year 1811.

The maps filed by them contain a description of the localities of the streets, avenues and public places required to be designated by them in the exercise of the authority created by its provisions, and when the maps were filed and published, as that was required by means of that act, a record was substantially made indicating the locality of these streets, avenues and places. After that had been done, and by means of chapter 86 of the Revised Laws of 1813, it was further provided that measures might be taken on the part of the city for opening and improving such streets as the public interests and convenience should require that to be done. But in the meantime no person was allowed to erect any building upon the lands designated as streets, avenues or public places upon the maps of the commissioners, without the assent of mayor, &c., of the city, and in case they did so, they were simply to be at liberty to remove them at their own expense when it should become necessary to open the streets, avenues, &c., and that was not to be attended with expense to the public authorities; but the commissioners to be appointed to estimate the damages and assess the expense of opening the street, &c., were prohibited from allowing any compensation whatever for any building which, at any time subsequent to the filing of the commissioners' maps, might be built or erected, or placed upon any such street, avenue or public place (*Revised Laws*

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1813, *vol.* 2, 414). Under these acts it became the policy of the city to indicate the future existence of the streets and avenues, and the localities over which they should be constructed and maintained, and when, by force of the legal provisions established by the legislature, they should afterwards be opened the damages were to be equalized by the benefits so far as the latter might prove adequate for that purpose. The street in controversy was one of those which was laid out and designated on the maps of the commissioners, and was afterwards within the protection of the provisions of both these statutes, and it was for the purpose of opening this street and rendering it useful to the public that the proceedings were taken which the motion is now made to confirm. The commissioners who were appointed to estimate the damages which might be sustained in opening and improving the street, allowed to the persons who are described in the proceedings as the devisees or heirs of Smith Bloomfield substantial awards for the property forming that portion of the street extending for the distance of 100 feet from the easterly line of Third avenue. The amount allowed was the sum of \$24,000, and they also allowed nominal damages for the land taken for the residue of the street easterly to a point 157½ feet westerly from Second avenue. The land for which the awards were so made was sixty feet in width, which was the width required to be included within its limits by the law of 1807 already referred to. The large award made for the land bounded westerly by Third avenue and extending easterly upon Sixty-seventh street to the extent of 100 feet has been opposed as unfounded both by the city and by the persons upon whose property the amount has been assessed. This award has been resisted as illegal, for the reason that the executors of Smith Bloomfield, who was the owner of the adjacent property and of the fee of that forming the bed of the street, had, by their own conveyance, made a dedication of this portion of the street, as well as that laying easterly from it, for the use of the public. Smith Bloomfield died on

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the 11th day of May, 1865, leaving a will which was admitted to probate, and under its provisions letters testamentary were issued to William and Ellis S. Bloomfield as his executors. At the time of his decease he owned the property situated upon the northerly and southerly sides of what had been laid out upon the commissioners' map as Sixty-seventh street and extending to the distance of 456 feet from the easterly line of Third avenue. He was also vested with the fee of the land designed to be appropriated for the purpose of that street. After their appointment these executors conveyed the land so owned by the testator upon both sides of the street, and in the deeds made by them they located the southerly and northerly lines upon Sixty-seventh street. The lands conveyed in each instance were described as laying upon one or the other side of this street, and they were bounded by its northerly or southerly side in equal and explicit terms, as they were appropriate for the purpose of indicating the line of the property intended to be conveyed. They did not bound the property along Sixty-seventh street, but along the northerly or southerly side of the street, and for that reason the grantees under the deeds acquired no title to the property situated within the northerly and southerly lines of the street (*Jackson* agt. *Hathaway*, 15 *John.*, 147; *Mott* agt. *Mott*, 68 *N. Y.*, 246). But while under the descriptions contained in these deeds the land situated within the limits of the designated street was not conveyed to the grantees whose deeds bounded them upon the street, it was still sufficient to entitle the purchasers to the use and enjoyment of the street itself. It was not stated in either of the deeds what was understood to be the width of Sixty-seventh street, but from other references and distances contained in the descriptions, it is reasonably evident that it was understood to be a street of sixty feet in width; and while the deeds do not define the extent of the street, it is reasonably plain that their references to it were made as it had been laid out and delineated on the maps filed by the commissioners; substantially,

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therefore, the land was conveyed by the executors upon each side of the street as a sixty-foot street, and that constituted its side one of the boundaries of the property conveyed. This description of the land as bounded by the street was sufficient to entitle the grantees to its perpetual use and enjoyment for that purpose, as an easement or servitude to the property which had been conveyed to them respectively. They had the right from that circumstance to insist that the land included in the limits of the street should be appropriated to and used for the purposes of a street for the benefit and convenient enjoyment of their property bounded upon it. The rule upon this subject has become reasonably well defined and so completely established as hardly to require the citation of authorities for the purpose of sustaining it. It has been stated to be that when land is granted bounded on a street or highway, that there is an implied covenant that there is such a way, and so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it (*White's Bank agt. Nichols*, 64 *N. Y.*, 65, 73; *Matter of Brooklyn*, 73 *N. Y.*, 179.) Such an intention is plainly manifested by the description made, and it is just that it should be rendered effectual. This principle has been applied directly to the cases of conveyances of land bounded upon streets laid out in the city of New York by the commissioners deriving their authority from the act of 1807. And where that has been done the conveyance has been attended with the effect of appropriating or dedicating the lands within the lines of the designated street, to the enjoyment and use of the person acquiring title under the deed, as one of the streets of the city (*Matter of Thirty-second Street*, 19 *Wend.*, 127; *Matter of Thirty-ninth Street*, 1 *Hill*, 191). The propriety of this principle has not been questioned by the learned counsel who has so ably urged the confirmation of the report made by the commissioners. But it is objected to as inapplicable to the present case, for the reason that the deeds conveying the testator's

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property, as it was situated upon what was called Sixty-seventh street, were executed by the grantors as executors. It is no doubt true that the legal appropriation or dedication of real estate for the purposes of streets or public places is required to be made by the sanction or authority of the owner of the fee. That principle is so well settled as to require no reference to the authorities for the purpose of sustaining it. But the executors in this case, under the will of the owner of the fee, were, in terms, empowered to dispose of it. It is not necessary to determine the point, discussed to some extent, whether the provisions contained in the will on this subject was a trust or a mere power, for in either case the effect of the language made use of would be the same. By that language the testator authorized such of his executors as should take upon themselves the execution of his will, or the survivor or survivors of them, for the purpose of dividing his estate, or otherwise to sell all or any part of his real estate, not specifically devised, either at public or private sale for cash, or upon credit, and upon such sale to execute the deeds necessary or proper to carry the sales into effect, and he then added that the sales so to be made should be an effectual bar against the claim of any person or persons claiming under him. The portion of the testator's property through which the street in controversy was laid out, was not specifically devised by him, and for that reason it was comprehended within this power conferred by him upon his executors. The authority given to them to sell it was of a broad and unlimited character, allowing that to be done as their judgment might indicate it to be proper and advantageous to his estate. The property was valuable for the occupancy and use of persons desiring to improve it. It was situated in that part of the city where it was available to be built upon, and it could be sold for that purpose only by providing some means of access to it. If the lots had been conveyed without the advantages of a street in front of them, they would evidently have been of much less value than if that means of approach and enjoyment

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were provided ; a proper sale of property of this description necessarily includes the power to provide some means of ingress and egress to and from it, and that in such a locality can be used as well by the owners as by all other persons passing in the vicinity.

In no other way can the proper advantage of this nature of property be acquired or enjoyed by the purchaser. The object of the testator in creating this power of sale, was to secure as large a sum as might be obtained from his property and a division of it among his devisees, and whatever was necessary properly to promote that end must be included within the power created by this provision of the will. The power properly to divide and lay it out in lots and streets, was a necessary incident of the power of disposition given by the testator to his executors. They might, it is true, have sold the property as a mass, but it is evident if they had done so, that the purchaser or purchasers would have been obliged to have opened the street in order to give them the full benefit and advantage of their purchases, and for that reason so much less would have been derived from the sale of the property as the land was considered worth, which would be required to be included within the limits of the street. The executors, in the exercise of their judgment, considered that not to be a favorable disposition of the property which they sold. They chose, on the contrary, to divide it up into lots bounded upon this street themselves, with the propable expectation that in pursuing that course more money would be derived from it than by a sale of it in any other manner. This was a subject which the testator had left to be determined by the judgment of his acting executors, and in what they did they seemed to have been warranted by the authority created by the will. In making the purchase the grantees must have paid part of the purchase-price for the privilege created by the deed of having the property purchased by them bounded upon this street. The deeds, as they are required to be construed, not only conveyed the land in terms described, but in addition to

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that the right to use and enjoy the intervening property for the purposes of a public street. The executors had the entire control of the fee to all of this property, and substantially in the exercise of their authority were owners of it, and empowered for that reason to sell it to the purchasers in such terms as to give them the incidental right to use and enjoy that which was referred to as the street. Ordinarily an executor would have no authority to dedicate the estate intrusted to him to public uses, but as incidental to the exercise of such an authority as this, they could lawfully do what by these deeds was clearly intended to be accomplished. So much was held to be proper, and within the power of executors in selling the property of the testator in the case of *Earle agt. Mayor of New Brunswick* (38 *N. J. Law Repts.*, 47). As to the lands laying easterly of that for which these large awards were made, and forming a portion of the testator's estate, the commissioners appeared to have adopted this view for they allowed only nominal amounts for its appropriation to the uses of the street. How that could have been done consistently with the large awards made for the sixty feet fronting upon Third avenue, it is not easy to perceive. For if the owners of the lots easterly of the 100 feet of the street fronting upon the avenue were entitled to use the land within the bounds of Sixty-seventh street, they had the right to pass over that laying to the west of them and extending to Third avenue. And having that right the result would be to reduce the value of the fee, not only to that forming the portion of the street lying easterly of it, but also to all that required to form their passage out to Third avenue. If they were right in withholding substantial awards from the easterly portion of the land situated in the street, they were wrong in making them for that lying to the west. As the deeds have been construed they were not justified in making these awards for the portion of the street adjacent to Third avenue, but they should have disposed of that as they did the other portions of this property, and limited the devisees of Smith Bloomfield

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to a mere nominal award. This is the principle which had been applied to cases of this nature when the public authorities have entered upon the land to open and construct the street over it which has been designated or adopted by the owners' conveyancers; and no good reason exists for a failure to observe it in this instance.

To the extent of the large awards made for the value of this property, the report of the commissioners was unauthorized and it must be disaffirmed.

The land to the east of that owned by Smith Bloomfield was known as the Schermerhorn estate; that extended easterly across the Second avenue. The First avenue and Avenue A to the East river, and so far as that was included within the limits of the street, awards were made by the commissioners for what they appear to have considered as its value as city property. Most of this land and that adjoining it was made the subject of an action in partition, which was determined in the year 1818. That was after the commissioners had located these streets and filed their maps, as it was required to be done by the act of 1807. While the land which was made the subject of the partition was not in its divisions bounded by these streets, reference was still made to them as streets which had been laid out and designated by the commissioners under the act of 1807, and in the course of the description which was given of the property in this vicinity, this particular street was mentioned as one of those existing in the city. It was not itself made a boundary, but one of the boundaries of a part of the property was located by a reference to its distance from Sixty-seventh street, and the property described was stated to include streets and avenues as well as the part that was not affected by their existence.

This reference to the streets, it is true, was not sufficient to create an appropriation of any portion of the estate to their construction, but without compensation; but it was a clear and distinct recognition of their existence and of the relation the other portions of the property described, sustained to them.

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This property appears to have been owned by Peter Schermerhorn at the time of his decease, and he left a will by which he empowered and authorized his executors, in their discretion, to sell and convey the portions of his real estate in the city as were known, as this was on the Louvre farm and the Belmont farm or any part or parts of either of them. This power, though more briefly expressed than that which was contained in the will of Smith Bloomfield, vested the executors with substantially the same authority over this property, and in the exercise of that authority they conveyed by a deed dated on the 1st day of May, 1868, a small portion of this estate to the Third Avenue Railroad Company.

In describing the property conveyed, they began the description on the southerly side of Sixty-seventh street at the distance of 150 feet westerly from the south-westerly corner of Sixty-seventh and Second avenue, and then ran the line westerly along the south side of Sixty-seventh street eleven feet and eight inches to the land of the heirs of Smith Bloomfield. While the division made in the partition suit was not of itself sufficient to constitute an appropriation of any part of this property to the purposes of the street, that together with this deed should manifestly be attended with such an effect.

For while the partition assumed the existence of the street, this deed unequivocally adopted it as a fixed and definite boundary of the property conveyed by it. The effect of that was to entitle the grantee under the deed to insist upon the right to use this street as a public avenue for the convenient enjoyment of the property conveyed to it. It brought the case as to this estate within the principle already mentioned and to which the westerly portion of the same street has already been subjected.

The street, as it was referred to in the partition and as it was also mentioned in this deed as one of the boundaries of the property conveyed, extended easterly upon the commissioners' map to the East river.

It ran in a straight line through this locality, and for that

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reason the grantee in the deed probably became entitled not only to the use of so much as formed one of the boundaries of the property conveyed, but also to the use of the entire street extending to its terminus at the East river.

Upon this subject it has been held that when the owner sells his lots, he sells them with all the privileges and advantages appertaining to them. One of them is that the street shall be opened without payment for the land taken.

"The purchaser of every lot gives an enhanced price in consequence not only of having a street adjacent to his own lot, of having a number of streets in the vicinity of his own lot according to the plan or map by which he purchased, and if no other map is used to designate the lots sold, the commissioners' map must control and be considered as referred to in the conveyance" (*Wymon* agt. *Mayor*, 11 *Wend.*, 487, 494; *People* agt. *Brooklyn*, 48 *Barb.*, 211; *De Witt* agt. *Ithaca*, 15 *Hun*, 568).

It was suggested in *Badeau* agt. *Mead* (14 *Barb.*, 328), that some of the authorities had extended this principle beyond the point at which it could properly be maintained, but it was not intimated that it should be as far restricted as to prevent the grantee, in the conveyance bounded upon the street, from acquiring the right to have the entire street opened for his use, as it is referred to in the deed. And for these reasons the commissioners do not seem to have been justified in making any of the substantial awards which they did make for that portion of the Schermerhorn property as was included within the bounds of this street. But however this may be, they certainly were not justified in making the awards which they did for the property lying between the easterly point mentioned in the deed to the railway company and the westerly bounds of Second avenue. The effect of the executor's deed was surely to entitle the grantee to insist upon the opening of that part of the street which was included between the easterly boundary of the land conveyed to the westerly line of Second avenue, upon the payment of mere nominal awards.

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This was not done, but the commissioners for the land included in that part of the street allowed the sum of \$12,084.

These were clearly unfounded, even if substantial awards might be made for the land included in that part of Sixty-seventh street lying easterly of Second avenue. Another partition of this property was made, in which it was declared that the reference to the streets should not be regarded as a dedication; but that can have no effect upon the disposition which should be made of this part of the controversy, inasmuch as the original decree in partition, together with the deed afterwards made by the executors created such a dedication. It is possible that facts may be proved which should require a different disposition of the portion of the controversy relating to the street east of Second avenue; but if that can be done they have not now been made to appear as they have been disclosed. There seems to have been no legal foundation for the large awards made for that portion of the street passing over the Schermerhorn estate. It had not previously been opened; but the right to open it seems to have been created substantially by the deed which the executors gave. If, however, these awards were not wholly unjustifiable from the proofs which have been produced upon the hearing of this application as to the value of property situated within the lines of streets laid out by the commissioners, the amounts awarded are greatly in excess of the real value of the property taken.

Allowing all proper effect for the observation and judgment of the commissioners themselves, the sums allowed by them appear largely to exceed that which would be just under the circumstances; and for that reason the report of the commissioners to this extent should not be sustained.

It appears by the conveyances which have been made since the executors' deeds of the property fronting upon Sixty-seventh street, between Second and Third avenues, that it has been bounded substantially in the same manner as it was in their deeds by the sides of that street. There has been no

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departure in this respect, but upon all occasions the street has been, in the disposition which has been made of the property, as one of the streets of the city.

The motion to confirm the report must be denied for the reason that the public authorities surely had the right to appropriate this portion of the property to the opening of the streets upon making a merely nominal compensation for the title taken to its owners, who held it subject to the right of the adjacent proprietors to have it used in that way, and because the awards for the lands east of Second avenue were greatly in excess of their market value. Whether the further hearing, which will be required, shall be had by the same commissioners or others will be determined when the order shall be settled, which will be upon notice to the respective counsel appearing.

SUPREME COURT.

SEYMOUR JONES agt. WILLARD PLATT.

Bill of particulars—when one will be ordered in an action of slander—Code of Civil Procedure, section 531.

In an action of slander the complaint alleged that on or about the 4th, 5th or 6th days of August, 1880, &c., the defendant, at the town of Western and elsewhere, &c., and at divers and various other times and places, and in the presence and hearing of divers good and worthy citizens, spoke of and concerning this plaintiff, &c. Upon application of the defendant an order was made directing plaintiff to deliver to defendant a bill of particulars specifying the times when and the places where the slanderous words alleged were spoken. A bill was served, which, after specifying a few times and places, stated that said defendant "did, as plaintiff is informed and believes, at other places and dates and times, in the town of Western, in said county of Oneida, during the month of August, 1880, speak of and concerning said plaintiff, the slanderous and defamatory words in the complaint mentioned and set out, but at what particular place or places or dates, said plaintiff is now

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absolutely unable to state or set out more particularly and definitely." Upon application of defendant for a further bill, which should comply literally with the order of the court, and also give the names of the persons in whose presence the words were spoken:

Held, that the plaintiff should be compelled to strike out the above clause or state the particular times and places, but was not compelled to give the names of the persons in whose presence the words were spoken. The decision in *Stiebling* agt. *Lockhaus* (21 *Hun*, 457) not followed.

Oneida Special Term, January, 1881.

MOTION for a further bill of particulars.

Action for slander. The complaint alleged that on or about the 4th, 5th or 6th days of August, 1880, &c., the defendant, at the town of Western and elsewhere, &c., and at divers and various other times and places, and in the presence and hearing of divers good and worthy citizens, spoke of and concerning the plaintiff, &c.

The answer was a general denial.

Application was made by defendant's attorneys, after issue joined, for a bill of particulars, at the circuit and special term held at Rome, September 27, 1880; and an order was then made and entered directing the plaintiff to deliver a bill of particulars "specifying the times when and the places where" defendant was alleged to have spoken the slanderous words set forth in the complaint.

A bill was thereafter served which, after specifying four times or dates and eight places, stated that said defendant "did, as plaintiff is informed and believes, at other places and dates and times, in the town of Western, in said county of Oneida, during the month of August, 1880, speak of and concerning said plaintiff the slanderous and defamatory words in the complaint mentioned and set out; but at what particular place or places or dates said plaintiff is now absolutely unable to state or to set out more particularly and definitely." This motion was then noticed. The defendant asked that a further bill of particulars be ordered, which should comply literally with the original order, and which, in addition,

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should contain the names of the persons in whose presence the alleged slanderous words were spoken.

Backus and Olney, for motion.

Oswald Prentiss Backus, of counsel, argued that the bill was evasive; that plaintiff had no right to make such a general allegation on suspicion, relying on his ability to fish up testimony before the trial to support it (*Tilton agt. Beecher*, 59 *N. Y.*, 186); that, under the allegations of the complaint and the bill of particulars, it was impossible for defendant to meet the charge and prepare for trial (*Stiebling agt. Lockhaus*, 21 *Hun*, 457; *Quin agt. Astor*, 2 *Wendell*, 577); that plaintiff's statement that he could not give time and place more particularly was false, as the persons who informed him of the slanders could give time and place; that, at all events, plaintiff could give the names of the persons in whose presence the words were spoken, and as defendant denies the slanders he should be obliged to do so (*Stiebling agt. Lockhaus*, *ib.*; *Robinson agt. Corner*, 13 *Hun*, 292). To make a bill of particulars as general and indefinite as the complaint itself, or to evade an order for one is a contempt of court, and may subject the guilty party to severe treatment (1 *Taunton*, 355; 1 *Barbour*, 53; 4 *Hill*, 50; 21 *Wendell*, 427; 2 *Wait's Practice Sup. Ct.*, 350; *Till & Shearman's Pr.*, vol. 2, p. 53).

Joseph I. Sayles, opposed, argued that to grant the motion would cut off and destroy important evidence in plaintiff's behalf; that he could not furnish further particulars, and that the bill was served in good faith, and read affidavits to that effect.

MERWIN, *J.*—In order to fairly comply with the order of September 27, 1880, the plaintiff should, I think, either strike out the last clause of the bill served—the clause com-

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mencing, "Said defendant did as plaintiff is informed and believes at other places and dates and times," &c.—or he should state the times and places with more particularity.

An order may be entered requiring a further bill to be served which shall strike out that clause or give the particular times and places. Costs of motion to defendant to abide event.

SUPREME COURT.

CHARLES BLIVEN agt. PERU STEEL AND IRON COMPANY.

Corporation receivership — A stockholder's right to wind up the business of a corporation, or have a receiver appointed.

A stockholder has no right by the inherent powers of a court of equity to bring suit to wind up the business of a corporation.

If a stockholder may proceed under 2 Revised Statutes, 463, section 38, which provides for dissolution when the corporation has been insolvent for a year, or has neglected or refused for a year the payment of its debts, or has suspended its business for a year, the plaintiff has not made out such a case. It is only a *judgment* creditor who can apply for sequestration under 2 Revised Statutes, 463, section 36. A creditor whose claim has not been prosecuted to judgment cannot so proceed.

A consent or acquiescence by the trustees of a corporation to a judgment not authorized by the statute, cannot be substituted for the methods so prescribed.

New York Chambers, January, 1881.

THIS is a motion to vacate a final decree in the above entitled action.

After the entry of the final decree, Charles Bliven, the plaintiff, died. The petitioners pray that his personal representatives be brought in as parties plaintiff, or the action be revived if necessary.

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The defendant is a manufacturing corporation, organized under the act of 1848 of this state.

About January 17, 1879, Charles Bliven, the plaintiff, then being the president of said corporation, commenced this action on behalf, as recited in the complaint, of himself and all other stockholders, trustees or officers of the defendant. He alleged that the corporation was indebted to him in the sum of \$6,950; that he had duly demanded payment of his claim, &c.; and charging that the corporation had stopped payment, was insolvent and unable to pay its pecuniary liabilities as they become due, and that its property would be lost, materially injured or destroyed; and praying,

I. An injunction restraining the corporation from exercising any of its corporate rights, franchises and functions, and transferring any of its property, &c., &c.

II. A receiver to take charge of the property and business of the defendant, and to perform all the duties of receivers in equity.

III. General relief.

The claim of the plaintiff was unsecured, not reduced to payment, and, so far as appears, not represented by any evidences of debt. The plaintiff had no lien upon the defendant's property.

It appears that the corporation is now solvent, and all unsecured claims (including plaintiff's) have been fully paid.

Final decree was entered May 27, 1879, by default.

No proof was given as to the truth of the allegations set forth in the complaint.

By the final decree it was adjudged:

I. "That the prayer of the complaint be granted."

II. "That the defendant is insolvent, and that its affairs and business should be wound up."

III. "That the defendant, its officers, &c., be enjoined from exercising any of the rights and franchises of said corporation, and from generally disposing of its property."

IV. "That the appointment of Francis J. Dominick as

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receiver in equity of all the property of the defendant be finally confirmed, and is constituted the receiver of said corporation, for the purpose of winding up its affairs," &c., &c.

The decree, therefore, was entered solely upon the ground that the corporation was insolvent.

This motion is based upon the petition of the defendant corporation, and of all its present trustees. The latter were not parties to the suit. They file the said petition both as trustees and as stockholders.

They ask, among other things, for the following relief :

I. That the decree in the above action be vacated and set aside.

II. That the action be then revived.

III. That the permanent receiver be reinstated as temporary receiver.

IV. That the petitioners be then allowed to come in and defend the said action, if they should be so advised, etc., and apply for an order discharging the receiver after he shall have accounted, etc.

V. That they have general relief.

Theodore M. Morgan and *John Clinton Gray*, for the motion.

Manley A. Raymond and *Algernon S. Sullivan*, opposed.

BARRETT, J.—It seems to me to be very clear that this application should be granted. Neither a stockholder nor a creditor had a right thus virtually to dissolve the corporation. It is well settled that such a decree is not warranted by the general or inherent powers of a court of equity. The statute is the sole guide in such matters.

The plaintiff Bliven filed his bill as a stockholder, although it is averred that he was a creditor as well. As a stockholder he was not entitled to a decree winding up the affairs of the corporation, and for that purpose appointing a permanent

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receiver (*Howe* agt. *Deuel*, 43 *Barb.*, 505; *Ramsey* agt. *The Erie Railway Co.*, 7 *Abb. [N. S.]*, 181; *Gilman* agt. *The Greenpoint Sugar Co.*, 4 *Lans.*, 483; *Galvey* agt. *U. S. Steam Refining Co.*, 36 *Barb.*, 256; *Denike* agt. *N. Y. and Rosendale Lime and Cement Co.*, *Ct. of Appeals*, see opinion *EARL*, J.) That was said in *Verplanck* agt. *The Mercantile Insurance Company* (2 *Paige*, 438) to be a virtual dissolution of the corporation. So in *Gilman* agt. *The Greenpoint Sugar Company* (*supra*), *INGRAHAM*, J., referred to *Howe* agt. *Deuel* (*supra*) as holding that in no case could a stockholder, except of a moneyed corporation, have a receiver appointed to take possession of the property of a corporation, "and thereby cause a forfeiture of the charter."

If a stockholder may proceed under that branch of the statute (3 *R. S.*, 463, *sec.* 38) which provides for dissolution when the corporation has been insolvent for a year or has neglected or refused for a year the payment of its debts, or has suspended its business for a year, as to which we need express no opinion, still it is, to say the least, exceedingly doubtful whether the plaintiff made out such a case. He says, in his complaint, that a part of the indebtedness has been due for a year; but that is not the averment of insolvency for a year. He also says that his entire debt of \$6,950 is now (that is, at the time of filing the bill) due, and that payment of the same has been demanded and refused, upon the ground of a lack of sufficient pecuniary assets. But he does not state when the demand was made, *non constat* it was within the year, perhaps the day before the filing of the bill. As to the suspension of business, the complaint falls far short of what the statute requires. A partial suspension will not do, nor, to quote the substance of the complaint, "a *practical* suspension to a *great extent* for the whole or greater part of the year." Even the then present insolvency of the company was only in the sense of inability to pay its debts as they matured.

There was in reality an excess of assets over liabilities, and

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the reverse was made out only by the strange process of including the capital in the list of liabilities.

The plaintiff was equally weak as a creditor; for nothing is better settled than this, that it is only a judgment creditor who can apply for sequestration under 2 Revised Statutes, 463, section 36.

It may be said that the company substantially assented to what was done. Even if that were so, the question of authority remains.

The statute points out the means of effecting the voluntary dissolution of a corporation. Consent to a judgment not authorized by the statute cannot very well be substituted for the methods so prescribed. But, in truth, the company did not so consent.

The proofs would seem to indicate acquiescence upon the part of some of the trustees in the appointment of a temporary receiver.

As to the board, however, there is a conflict of evidence. However that may be as to the temporary receivership, it is quite evident that the plaintiff, Bliven, who was president of the company, acted upon his own responsibility in procuring *the final decree*. He had no authority from the board of trustees to proceed to this grave extremity. The present body would be derelict in its duty if it suffered the company to be thus practically wiped out of existence.

There was, in fact, no necessity for this iron-clad decree. What has been done could as well have been accomplished, certainly without any greater straining of the statute, under orders of the court to the temporary receiver.

But even the exigency which undoubtedly prompted the plaintiff's irregular action has ceased; for it now appears that the entire unsecured indebtedness of the company has been paid, with every reasonable prospect, one would think, from the receiver's past success, of the payment at no distant period, of the secured indebtedness. Thus, the danger to be apprehended from judgments at law has passed away, and

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the company is free to put its energies, facilitated by the receiver or other suitable agencies, to the work of complete and perfect rehabilitation. The payment of the unsecured indebtedness is admitted, but the present plaintiffs seeks to retain the judgment for their bonds, which is the form of the secured indebtedness. This will not do, for the reason that the complainant was entirely silent as to the bonds, and naturally so, because no part thereof was due when Bliven exhibited such complaint. He cannot now, nor can other bondholders, in a like position, be permitted to uphold this unauthorized and now really *spent* judgment, by a supplement entirely foreign to the grounds upon which it was obtained, especially as the papers disclose the fact that an original bill in due form has been filed, and is now pending on behalf of the bondholders; in which action his and their rights, with respect to the secured indebtedness, will be fully and adequately protected. That bill proceeds upon a different footing from the present. The bondholders have a specified lien, but seemingly no present right to foreclose. Consequently they have a distinct equity to preserve the subject-matter of the lien, and, by the carrying on of the business temporarily through a receiver, to conserve that lien, and in due time render it practically available. So that even if the bondholders had become parties to this suit, which, in a legal sense, they have not, the *non sequitur* of such a supplement to the original bill herein is apparent.

These conclusions cannot be affected by the individual action of one or more of the trustees. We have not, for instance, overlooked what is said as to Mr. Gunther's general assent as to his agreement with Bliven, and in fact as to his course throughout.

But his individual action or non-action could not bind the company, and the essential fact remains that this application proceeds from the company and its board of trustees.

While we have been compelled to criticise the present action, we have no doubt that it was originally well intended,

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and indeed that it has served a useful purpose. But the statutes of our state cannot be disregarded, however great or pressing the emergency. Still, the receiver has acted in good faith and he will be protected for whatever he has done under the orders of the court.

We do not now definitively decide that the present action should be dismissed and the receiver directed to account, for such relief is not within the scope of the present application.

But we think upon a review of the whole case, which is more or less involved in this motion, that the plaintiffs would do well to adopt that course, particularly in view of the satisfaction of the unsecured indebtedness and the pendency of the bondholder's suit. If notwithstanding this recommendation they insist upon proceeding, the company will be permitted to answer or demur. If it answers it should have leave to set up the payment of the unsecured indebtedness and any other matters which have happened since the commencement of this suit by way of supplement, as well of course as any proper defense existing at the time of the commencement of this action.

The order will therefore be that the motion papers be amended throughout by striking out the name of Charles Bliven as plaintiff, and inserting instead thereof the names of the executors, who it appears have already been brought in as parties plaintiff in place of said Charles Bliven, deceased.

The order will further provide that the final judgment herein be vacated and set aside, and that the company be permitted within twenty days either to demur or to interpose an original and supplementary answer.

And further, with leave to the defendant to move at any time for the discharge of the receivership and for an accounting by Mr. Dominick and the closing up of his trust, so far as this suit is concerned. No costs of this motion. Let the order be settled upon two days' notice.

NOTE.—The foregoing opinion is calculated to remove some misapprehensions which have obtained in reference to the power of a stockholder

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or creditor of a private corporation to procure the closing up of its affairs by a receivership. It should be read in connection with the provisions of title 2 of chapter 15 of the Code of Civil Procedure, which modify very much the rules heretofore applicable on this subject. The opinion points out that a stockholder or a creditor cannot, except under the statute, compel the dissolution of the corporation in this manner, even if the corporation do not resist the proceeding or substantially assent to the receivership.

The question whether a stockholder can proceed under the statute (2 *R. S.*, section 38; 3d *Id.* [6th ed.], 748) on the neglect of the corporation for more than one year to pay its debts, &c., or for the suspension of its business — a question not decided by the foregoing opinion — was passed upon by judge DANIELS in *Kitteridge agt. The Kellogg Bridge Co.* (8 *Abb. N. C.*, 168), where he held in the affirmative in respect to corporations organized under the general manufacturing laws, conceding, however, that the contrary rule was established by the act of 1870, which gave the power of thus proceeding to the attorney-general exclusively.

Under the statutes existing previous to the adoption of the Code of Civil Procedure a clear distinction existed, recognized by the courts between an action to terminate the business and existence of the corporation, and an action to rescue it from danger of being terminated by unfaithful officers.

The provisions of the Code of Civil Procedure in effect require that an action for the former purpose must be brought by the attorney-general exclusively, unless he omits for sixty days after due request to do so, in which case the creditor or stockholder who made the request may, with leave of court, bring the action.

In respect to the second class of actions to overhaul the conduct and transactions of officers and remove them for misconduct, the Code of Civil Procedure allows the action to be brought by the attorney-general or, except when removal or suspension from office is asked, by any creditor or officer; but singularly enough does not recognize the right, which the courts have always recognized, of a stockholder to bring the action if all the officers refuse.

There is a provision, however (*Code of Civil Procedure*, sections 1808, 1986), by which, if under the foregoing rules, an action can only be brought by the attorney-general alone, he may be retained for the purpose by a creditor, stockholder, director or trustee, and in such a case the action will be in the name of *The People*, on the relation of the person retaining him.

Whether these provisions extending the power of the attorney-general are to be in effect an enlargement of the license and immunity of the managers of corporations, or whether they are to be an additional protection for stockholders and creditors, must depend very much on the discretion and fidelity of that officer. Apart from that it would seem doubt-

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ful whether justice is promoted by refusing to allow stockholders and creditors to apply to the court to redress any wrong to the corporation which the officers refused to do; and it is a question whether all the advantages without the inconveniences would not be secured by requiring a private plaintiff to make the attorney-general a party, and, if unsuccessful, pay his costs (*See 1 Laws 1880, p. 756, c. 537*).—[REF.]

SUPREME COURT.

HORACE H. ADAMS agt. FRANK B. WARD and another.

Cost upon demurrer—Interlocutory costs upon issue of law—Affidavit respecting disbursements—Code of Civil Procedure, sections 419, 420, 3232, 3267.

It is proper to allow costs on the decision of a demurrer, though an issue of fact is left to be determined upon a trial.

Where the plaintiff drew the demurrer and served it and noticed the argument thereof, for such services, he is entitled to the costs before and after notice of trial, as well as twenty dollars for a trial of an issue of law.

Items for copies of documents cannot be allowed without an affidavit that it or they were actually and necessarily used or obtained for use.

Where the case is one where no application is necessary to the court for judgment upon the complaint if no answer had been served, the plaintiff, on decision of demurrer, is only entitled to fifteen dollars for costs before notice of trial.

Where the plaintiff fails to make the indorsement upon the summons as required by section 419 of the Code of Civil Procedure, he is only entitled to fifteen dollars costs before notice of trial

Herkimer Special Term, January, 1881.

John C. Fulton, for plaintiff.

G. M. Allen, for defendant.

HARDIN, J.—This is a motion made to set aside or review taxation of costs. When the demurrer was decided, costs

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were awarded to the plaintiff. That was proper, though an issue of fact was left to be determined upon a trial (*Sec. 3232 of Code of Civil Procedure*; 76 N. Y., 314, *Cambridge Valley R. R. agt. Lynch, decided in 4th dept. and affirmed*). That exercise of discretion cannot be reviewed upon this motion (*Stevens agt. Veriane, 2 Lansing, 92*; 14 Hun, 477, *op. HARDIN, J.*).

The items for copies of documents "cannot be allowed without an affidavit that it or they were actually and necessarily used or obtained for use." Such an affidavit is required by section 3267 of the Code of Civil Procedure. None such was furnished and the taxation was therefore irregular, and as the practice is new under the section quoted, it is proper that the parties should be again heard by the clerk upon such papers as they may submit upon a fresh taxation. Upon the taxation to be had, the clerk will tax costs before notice, after notice, and for trial of an issue of law. The question made by the defendants as to the costs before notice and after notice of trial must be ruled against the defendant. The plaintiff drew the demurrer and served it and noticed the argument thereof. For such services he is, by the well settled practice, entitled to the costs before and after notice of trial, as well as twenty dollars for a trial of an issue of law ("*Anon.*," 3 Sanford, 756; *Van Valkenburgh agt. Van Schenck, 8 How., 272*; *Crary agt. Norwood, 5 Abbott, 220*).

Upon the papers now produced upon this motion, it seems to be apparent that the case is one where no application was necessary to the court for judgment upon the complaint if no answer had been served (*Sec. 420 of Code*). Besides, the summons which is produced seems to have a manuscript indorsement on it of the words "summons and complaint." Thus it would seem it was a case where the plaintiff should have fifteen dollars instead of twenty-five, as stated in the bills of costs.

Besides, the plaintiff made no indorsement upon the summons, as required by section 419 Code of Civil Procedure; therefore, as the papers now appear, the plaintiff was only enti-

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bled to fifteen dollars for costs before notice of trial. However, as a retaxation is to be ordered, the clerk will consider the question as to what the item should be when the parties appear before him with fresh papers. A retaxation is ordered before the clerk of Jefferson county upon five days' notice. The defendants are allowed ten dollars costs of this motion, which may be offset against the plaintiff's costs, as they shall be ultimately taxed by the clerk. After service of a copy of this opinion, the clerk of Jefferson county may enter an order in accordance therewith.

SUPREME COURT.

MATTER OF ONE HUNDRED AND THIRTY-EIGHTH STREET, &c.

Constitutional law — Practice in street-opening matters in New York city.

Chapter 604, Laws of 1874, entitled "An act to provide for the surveying, laying out and monumenting of certain portions of the city and county of New York, and to provide means therefor," is not unconstitutional for the reason that being a local act the subject of opening streets is not expressed in its title as required by section 16 of article 3 of the constitution.

Objections and affidavits in opposition to the report of the commissioners of estimate and assessment, which were not presented to the commissioners within the time or in the manner required by the statute cannot be received upon a motion to confirm their report, a sufficient excuse not being alleged for the omission.

The report of the commissioners will be regarded with the same or even greater consideration than the verdict of a jury on the question of the value of the property taken or amount assessed, and unless some wrong principle has been adopted in estimating awards granted or assessments imposed, the report will be confirmed.

Special Term, November, 1880.

On the 17th day of November, 1880, the commissioners of estimate and assessment presented their report to the court

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for confirmation. Assessments for benefit were levied upon the property adjacent to the streets and upon the city. The corporation counsel asked leave to object to part of the report which awarded substantial awards for portions of land in One Hundred and Thirty-eighth street, and to read certain affidavits which had not been submitted to the commissioners in support of the objection that these lands had been dedicated. Various property owners appeared by counsel, some in favor of the motion to confirm and others in opposition thereto.

The nature of the objections sufficiently appear in the opinion.

James A. Deering and *John C. Shaw*, for property owners, moved for confirmation of report.

William S. Tedball, *E. Huerstel*, *Ernest Hall* and *George E. King*, for motion.

William C. Whitney, corporation counsel, and *Arthur Berry*, for the mayor, &c., opposed.

John H. Strahan and *William J. Marvin*, for property owners, opposed.

LAWRENCE, J. — The claim that the act of 1874 under which these proceedings were instituted is unconstitutional, for the reason that, being a local act, the subject of opening streets is not expressed in its title as required by section 16 of article 3 of the Constitution, cannot, in my opinion, be successfully maintained. The title of the act is "An act to provide for the surveying, laying out and monumenting of certain portions of the city and county of New York, and to provide means therefor" (*Laws of 1874, chap. 604, p. 831*).

The section of the Constitution with which this act is said to fail to comply, has often been the subject of consideration

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by the courts of this state. In the case of *Sun Mutual Insurance Company* agt. *The Mayor, &c., of New York* (4 Selden, p. 253), GARDNER, J., in delivering the opinion of the court, says: "There must be but one subject, but the mode in which the subject is treated, or the reasons which influence the legislature, could not and need not be stated in the title according to the letter and spirit of the Constitution. * * * The purpose of the sixteenth section was, that neither the members of the legislature nor the public should be misled by the title, not that the latter should embody all the distinct provisions of the bill in detail." In the case of *The People ex rel. The Board of Commissioners of Washington Park* agt. *Banks* (67 N. Y., p. 568 to 572), Justice ALLEN, in delivering the opinion of the court of appeals, says: "It is not allowable for the purpose of invalidating a law to sit in judgment upon its title, to determine with critical acumen whether it might not have been more explicit and so drawn as more clearly and definitely to indicate the nature of the legislation covered by it. The legislature is not subject to judicial control in respect to the form or mode in which the subject of a bill shall be expressed. If it is expressed the Constitution is satisfied."

In this case the learned justice in his opinion collates many of the authorities upon the section of the Constitution under consideration, and it is therefore unnecessary to refer to them more in detail here (*See also Newendorf* agt. *Duryea*, 69 N. Y., p. 557; *Matter of Volkening*, 52 N. Y., p. 650). Guided by these decisions I find no difficulty in upholding the constitutionality of the act of 1874.

That act has but one subject, and the subject is expressed in its title. The subject may be briefly defined to be the laying out or improvement of that portion of the city and county of New York which is referred to in the first section of the act. The criticism that the title of the act does not refer to the power given by the fourth section of the act to the commissioners of the department of public parks, to acquire title

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to the lands required for the streets, avenues and roads, I do not regard as sound. The title of the act provides for the surveying, "laying out" and monumenting, &c. I regard the term "laying out" as sufficiently comprehensive to embrace proceedings for the acquisition of the title to the lands required for the purposes of streets, avenues and roads mentioned in the act (*See Webster's Dictionary as to the meaning of the term "laying out."*)

Furthermore, although it is the duty of the court to declare an act of the legislature as invalid where it clearly violates the provisions of the constitution, no court will be warranted in pronouncing a statute unconstitutional, unless its unconstitutionality is manifestly plain, and this in any view which may be taken of it is not to my apprehension such a case.

With reference to the provisions of the act of 1880 (*chap. 579, pp. 868 and 869*), it is sufficient to observe that an examination of the act satisfies me that it was intended to operate prospectively and not retrospectively. It cannot be supposed that the legislature intended the act to apply to a proceeding which had progressed to completion, so far as the work of the commissioners was concerned when the act was passed.

It seems clear to me that if such had been the intent of the legislature it would have been expressed in plain and positive terms, without being left to inference or implication (*See Calkins agt. Calkins, 3 Barb., 310; Dash agt. Van Kleeck, 7 Johns., 477; Snyder agt. Snyder, 3 Barb., 621; Wood agt. Oakley, 11 Paige, 403; Potter's Dwarries on Statutes, 162 and 163, note 9*). The affidavits proposed to be read by the counsel to the corporation cannot be received at this stage of the proceeding. They were never presented to the commissioners within the time or in the manner required by the statute, and a sufficient excuse is not alleged for this omission (*Matter of Harrison Street, 19 Johns. Rep., 231; Matter of William and Anthony Streets, 19 Wend., 678; Matter of Opening of the Eleventh Avenue, 49 Howard P. R., 288*). The opinion of the general

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term of this court in the matter of One Hundred and Fifty-sixth and other streets, is not in conflict with these views on this point (*See opinion of INGALLS, J., in which it is stated that the case is not in conflict with the Matter of the Eleventh Avenue*).

In the case of *One Hundred and Fifty-sixth street* the objector was allowed, if I correctly understand the case, an opportunity of presenting testimony to the commissioners in support of objections which had been theretofore properly taken before the commissioners.

In this case it does not appear that the city ever took the objections sought to be presented upon the affidavits handed to the court on this motion.

But even if the affidavits were to be received they do not so plainly make out, to my mind, that any error has been committed by the commissioners in the matter of the awards made for lands taken upon One Hundred and Thirty-eighth street, or in the assessments imposed upon the city for benefit, as to require me to send back the report to the commissioners, or even to justify me in doing so.

It is not at all clear that any substantial awards have been made by the commissioners for land which had been previously dedicated or acquired for a public street, or that the right of the city as riparian owners have been overlooked or disregarded.

The other objections which have been filed to the confirmation of the report of the commissioners, relate principally to the amount of the assessments which have been imposed for the benefit derived from the improvement.

It has long been settled that the report of the commissioners will be regarded with the same favor as and even with greater consideration than the verdict of a jury on a mere question of value, as the commissioners are authorized to act upon a personal view and individual knowledge (*Matter of John and Cherry Streets*, 19 Wend., 595; *Matter of Central Park*, 35 Howard, 265; *Matter of Opening Eleventh Avenue*, 49 Hun, 214).

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The objections which were interposed by Mr. and Mrs. Hall, I am advised, are withdrawn.

Finally, I do not discover that any wrong principle has been adopted by the commissioners in the awards granted or in the assessments imposed, and it follows therefore that the report should be confirmed.

N. Y. SUPERIOR COURT.

GOULD H. THORP agt. LAURA M. THORP.

Marriage — Divorce — Foreign marriage in evasion of domestic divorce — Effect of marriage contracted in another state when forbidden by a judgment of divorce of a court of this state.

Where a person from whom a former wife obtained a decree of divorce in this state, in which decree he was forbidden to marry again during her lifetime, goes to another state for the purpose of evading the law, and there, the first wife being still alive, contracts a second marriage, immediately thereafter returns to this state.

Held, that although it be true that such marriage is to be judged by the *lex loci contractus*, the preliminary question of the capability of the party to contract a second marriage is presented when such party appeals to a tribunal of this state, and that capability is to be determined by the law, not of Pennsylvania but of New York; and as by the laws of the latter state he was absolutely forbidden to contract it, such second marriage was void (*see Kerrison agt. Kerrison, ante, 21*).

General Term, January, 1881.

Before SPIER and FREEDMAN, JJ.

THIS is an appeal from an order and judgment in an action for an absolute divorce on the ground of adultery. The referee appointed by the court to hear and determine, found for the plaintiff. Upon a motion made to confirm the referee's report the court dismissed the complaint, and judgment of dismissal was entered accordingly, with costs.

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D. M. Porter, attorney and of counsel for plaintiff and appellant.

Alvin Burt, attorney and of counsel for defendant and respondent.

SPIER, *J.*—The answer in substance denies the adultery charged in the complaint, and sets up counter charges against the plaintiff; and, as a defense, charges a former marriage of the plaintiff with one Emma C. Reed, in 1855, and a judgment of divorce in an action brought by her against the plaintiff in this action for adultery, in the supreme court, Kings county, in October, 1861, and a decree entered in November, 1861, in the usual form, forbidding the plaintiff to marry again during the life of the said Emma; that the said Emma was living when the plaintiff married the defendant herein.

The defendant gave no evidence as to the adultery charged in her answer, nor did she give any testimony contradicting the evidence charged against her in the complaint, but rested her defense solely upon the invalidity of the alleged marriage between her and the plaintiff.

It appears in the case that the said plaintiff, Gould H. Thorp, and the defendant, Laura M. Thorp, both residing here, to evade the laws of this state and said judgment and decree, went from the state of New York to the city of Philadelphia, entered into the contract of marriage mentioned in the complaint, returned to this state and continued their residence therein ever since said marriage.

When the plaintiff left this state for Pennsylvania and had the marriage ceremony there performed, it was, as must be assumed from the immediate return of the parties to be, their intention to continue and make this state their domicile and enjoy the protection of its laws. A marriage contracted by a person situated as is this plaintiff, is forbidden by express statute of the state. "Whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no de-

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fendant convicted of adultery shall marry again until the death of the complainant." By another section it is provided that any violation of this provision "shall be absolutely void."

It must be admitted that the validity of a marriage like the present has been heretofore an open question. We are not informed that the court of last resort in this state has determined any of the questions presented in this case. The supreme court of this district has decided them against the validity of the marriage by a majority of the court upon able opinions delivered by two of the learned judges on both sides of the question (*reported in 2 Hun, 238*), and we believe the supreme court of the second district have lately adopted the views of the court of this district.

Among the objections urged are that the statutes are fully satisfied by a construction which limits their prohibition to a second marriage contracted within this state. If this be conceded, it necessarily follows that the intention of the statutes was to permit either party to the contract, divorced for either his or her adultery, to go outside of its jurisdiction and marry again while the former husband or wife were living within that jurisdiction. It seems plain to us that this view of the case wholly overlooks the object and intention of the legislature. The statute not only forbids the marriage by prohibitory words, declaring it to be wholly void, but also attaches to the violation of the contract of marriage a punishment by depriving the guilty party of the power of entering into the marriage state during the lifetime of the injured party.

The question is one of policy of the law in its administration. It is the duty of those who administer the laws to see that they shall not be disregarded or violated by any of its citizens while enjoying its protection and privileges. The plaintiff here, by a decree of the court exercising jurisdiction, being forbidden to enter into the contract of marriage during the life of the partner he was bound to cherish and protect, goes into a foreign jurisdiction, sets at defiance the mandate of the court of his domicile by a second marriage, and now

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appeals to be relieved from the consequences of a contract illegal and void by the laws of his own state.

The case here is not one of domicile in Pennsylvania, for it is stated that the parties were domiciled here and went to Pennsylvania in fraud of our law. If the laws of Pennsylvania allow of such a marriage, and although it be true that that marriage is to be judged by the *lex loci contractus*, it is but reasonable that every state must so far respect its own laws and their operation upon its own citizens as not to allow them to be evaded by acts in another state for the purpose of defeating them.

We are of the opinion that in determining the matter before us a preliminary consideration is presented, that is, the capability of the party to contract the second marriage; and the question is, whether that capability is to be determined by the law of Pennsylvania or the law of New York.

The plaintiff here appeals to the tribunal of the state to which he owes allegiance and presents the question for its decision, whether he has the capacity to contract a marriage out of the state, and which by a decree of one of its tribunals he was absolutely forbidden to contract.

The answer to this question is settled by a direct adjudication in *Conway agt. Beasley* (3 *Hagg.*, 639), which is precisely our case, in which persons domiciled in England were divorced in Scotland, and then one of them married again in Scotland, and upon coming again into England that second marriage was declared null, though it was admitted to be good by the law of Scotland.

The plaintiff has chosen the tribunal exercising jurisdiction within the state of his residence to decide a question involving the validity of a contract entered into by him outside of that jurisdiction which he was forbidden to make by a judgment or decree of one of its own tribunals.

The order and judgment appealed from should be affirmed, with costs.

FREEDMAN, J., concurs.

Conley agt. Petrie *et al.*

CITY COURT OF BROOKLYN.

JOHN D. CONLEY agt. JOHN PETRIE *et al.*

Referee— *When order of reference made upon consent will be vacated and a new referee substituted.*

Where two causes against the same defendants were referred by consent and the referee had heard and determined the first in favor of the plaintiff, a number of questions involved in the second cause being also involved in the first case; on motion by defendants:

Held, that the order of reference should be vacated and a new referee substituted.

Special Term, July, 1880.

THIS was a motion to vacate an order of reference made upon consent and to substitute a new referee, upon the grounds that the referee had tried a case wherein the present plaintiff's brother and agent was plaintiff, and these defendants were defendants, and that a number of questions involved herein were involved in the first case, and that inasmuch as the referee had once passed upon the questions of fact, he was therefore disqualified.

The same witnesses were required in both cases.

Chas. G. Cronin, for the motion.

I. This is not an usual motion. The position of the defendants is a familiar one. No party should be required to enter upon the trial of an issue feeling that he has to overcome the preconceived opinion of the tribunal before whom he appears (*Schermerhorn agt. Van Allen*, 13 *How.*, 82).

II. A referee stands in the same position as a jury and is subject to the same objection on the score of prepossession as would be urged against a juror on the second trial of the same case (*Billings agt. Van Derbeck*, 15 *How.*, 297).

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III. The defeated parties enter upon the second trial of a cause before the same referee with his views and prejudices all against them. He has seen and heard the parties and their witnesses and found his estimate of their credibility and of the force and effect of their evidence (*Sharp agt. The Mayor, &c.*, 19 *How.*, 198). We should not be compelled to overcome the impressions made upon the mind of the referee by what has already taken place in the other cause.

Harrington Putnam, opposed.

NEILSON, *Ch. J.* — This cause and another against the defendants were referred to C. P., Esq., by consent. The other cause has been tried by the referee and decided in favor of the plaintiff therein. The defendants now move to have another referee appointed in the place and stead of Mr. P., and it appears that while the actions are not for the same claims, there is such intimate relations as to justify the suggestion that of necessity the referee would go into the trial of this action with impressions, if not convictions, derived from the other hearing, touching some points yet to be litigated.

The application is not novel nor does it in any degree proceed upon the notion that the referee would not seek to do justice between the parties. It would be hard, under the circumstances, to deny the application and I feel constrained to grant it.

An order vacating the existing order of reference will be entered.

Murphy agt. Travers.

SUPREME COURT.

MARGARET MURPHY agt. WILLIAM R. TRAVERS and EDWARD MURPHY, Jr., as executors, &c., of JOHN MORRISSEY, deceased.

Practice—Action for accounting—Security for costs—When required, under section 3271 of Code of Civil Procedure, of plaintiff suing executors.

A plaintiff suing executors will, under section 3271 of the Code of Civil Procedure, be required to give security for costs where it is made to appear by affidavit that he is pecuniarily irresponsible and unable for that reason to pay costs, although the action is concededly brought in good faith.

Special Term, February, 1881.

John McCrone, for plaintiff.

Dorsheimer, Bacon & Deyo, for defendants.

THIS action was brought by the plaintiff, as legatee under the will of John Morrissey, deceased, she being the sister and one of the heirs-at-law of said deceased. The plaintiff sued for an accounting by the executors, claiming that the real estate of deceased was chargeable with the payment of legacies, and that in consequence of the inadequate jurisdiction of the surrogate's court, her only remedy was by resort to a court of equity.

The defendants moved, on an affidavit alleging the want of pecuniary responsibility on the part of plaintiff, and her inability for that reason to pay costs, that she be required to give security for costs in the sum of \$1,000. The plaintiff, in opposition to the motion, contended that as the action was brought in good faith, which was not disputed by defendants, and as the granting of the motion was in discretion, under

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section 3271, the plaintiff should not be required to give the security asked, and cited *Darby* agt. *Condit* (1 *Duer*, 599); *Shepherd* agt. *Burt* (3 *Duer*, 645), and *Kimberly* agt. *Stuart* (22 *How.*, 281).

Held, DONOHUE, J., that the motion should be granted, with ten dollars costs.

SUPREME COURT.

PETER MASTEN and WILLIAM M. HAYES agt. WILLIAM B. WEBB.

Sheriff—When liable to an action by the real owners of personal property for levying upon the same on an execution against a person in whose possession the property is, under an agreement and by permission of the real owners—Such action cannot be maintained without a demand.

Under a judgment recovered by the plaintiffs against T., and execution issued thereon, the plaintiffs had purchased the property in question, which was household furniture. They also, in the same manner, acquired title to goods in a store which had previous to that time been owned and conducted by T. From the time of the purchase T. had remained in possession of the goods (the household furniture) under an agreement by which he carried on the old business of his in the store for the benefit of the plaintiffs as their agent or clerk, at a salary, with the right to retain the furniture in his own house for the use of himself and family. The defendant, as sheriff of Ulster county, had, at the time this action was commenced, under an execution issued upon a judgment duly recovered in this court against said T., made a levy upon the furniture then in possession of T., and used by him in the dwelling-house which he occupied, but had not removed the same nor in any manner interfered therewith further than to make the levy. No demand of the possession of the property was made of the defendant prior to the commencement of this action:

Held, that, although plaintiffs could maintain an action to recover the possession of the property, the action could not be maintained without a demand. The mere levy upon the goods is not sufficient in itself to maintain the action.

The agreement under which T. held the property gave him no right to hold the same for any specified or definite period. He had no leviable

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interest whatever therein. He was but the servant or clerk of the plaintiffs, holding the property for them during their pleasure. The plaintiffs, therefore, were not only the owners, but were entitled to the immediate possession of the property at the time of the levy.

When a person is in possession of and exercising acts of ownership over personal property of another, the owner cannot, until demand or notice to the sheriff, maintain an action against him for levying upon and taking it under process against the person in possession.

Ulster Special Term, June, 1880.

MOTION for a new trial on judges minutes.

F. L. Westbrook and *George Van Etten*, for defendant and motion.

Mr. Fiero, for plaintiff and opposed.

WESTBROOK *J.* — On the trial the following facts appeared: Cornelius J. Townsend was once the owner of the property in question, which the plaintiffs have taken from the defendant in this action, who, under an execution issued upon a judgment duly recovered in this court against said Townsend, and placed in his hands as sheriff of Ulster county for collection, had levied upon the same.

Under a judgment recovered by the plaintiffs against Townsend, and execution issued thereon, the plaintiffs had, in 1877, purchased the property in question, which was household furniture. They also, in the same manner, acquired title to goods in a store, which had previous to that time been owned and conducted by Townsend in the city of Kingston. From the time of the purchase, Townsend had remained in possession of the goods (the household furniture) in controversy in this action, under an agreement by which he carried on the old business of his in the store for the benefit of the plaintiffs, as their agent or clerk, at a salary of fifty dollars per month, with the right to retain the furniture in his own house for the use of himself and family.

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The defendant had, at the time this action was commenced, made a levy upon the furniture then in possession of Townsend, and used by him in the dwelling-house which he occupied, but had not removed the same, nor in any manner interfered therewith, further than to make the levy. No demand of possession of the property was made of the defendant prior to the commencement of this action, and upon the trial the defendant moved for a nonsuit, upon two grounds, to wit : First. That, as Townsend was in possession under an agreement which has been stated, the plaintiffs could not maintain an action to recover the possession thereof. Second. That, at all events, the action could not be maintained without a demand.

The points were ruled *pro forma* against the defendant on the trial, and the defendant, who excepted to such ruling, having been beaten at the circuit by the jury upon the question of actual ownership, now moves for a new trial on the same grounds, which will be discussed in the order in which they have been herein stated.

The agreement under which Townsend held the property gave him no right to hold the same for any specified or definite period. He had no leviable interest whatever therein. He was but the servant or clerk of the plaintiffs, holding the property for them during their pleasure. The plaintiffs, therefore, were not only the owners, but were entitled to the immediate possession of the property at the time of the levy. This case is unlike that of *Wheeler agt. Train* (3 *Pickering*, 255), in which the property had been let for one year, and that of *Fairbanks agt. Phelps* (23 *Pickering*, 535), where the property was held under an agreement to purchase, which could only be forfeited by a neglect or failure to pay the purchase price. It is like any other case of employment, in which the party during such employment uses the property of his employer, and would be just as applicable to the case of a hired man sleeping in the bed of his hirer, were an action brought by the employer for the bed against a third

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person, as to the present. This objection must, therefore, be overruled.

The second point is far more serious. The defendant in the execution (Cornelius J. Townsend) was in possession of the property, which was furniture, and was actually in use by him in his own house. Apparently he was the owner, and was such apparent owner by the act and with the knowledge of the plaintiffs when the levy was made by the defendant. If, under such circumstances, a sheriff, having a valid execution against the person in possession, levies, can the true owner subject him to the costs of an action without a demand?

In *Rawley* agt. *Brown* (18 *Hun*, 456), and in many other cases, it has been held that "one purchasing in good faith, at a sheriff's sale under execution, goods in the possession of the judgment debtor, is not liable to an action brought by the true owner to recover the goods or their value, until a demand therefor has been made and refused." On what obvious principle do these decisions rest? The buyer had exercised dominion over the property; he had removed the property, and thus deprived the real owner of the enjoyment thereof. In some cases such acts would justify an action without a demand, but in these they would not, because appearances have deceived the buyer, and he is guilty of no tortious act, until the owner informs him of his rights, which he ignores.

The same principle is applicable to the present action. The sheriff acts upon appearances, which the plaintiffs aid in producing, and they have no right to subject an officer to the costs of an action until, by demand, they place the officer in the wrong. In *Williams* agt. *Loundes* (1 *Hall*, 637 [2d edition], see page 656) the superior court of the city of New York held, when the defendant in the execution was in the possession of the property, that: "It was the duty of the sheriff to make the levy without any indemnity whatever, as he found the goods in the hands of the defendant in the execution, and he would not have been liable as a trespasser if he had made such a levy. The goods were pointed out to him as the goods

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of the defendant in the execution; he was exercising acts of ownership over them; they were in his exclusive custody and possession, and the sheriff would have incurred no peril from the act of levying." The case cited is exactly applicable to the present one. This action, which is for a wrongful taking by the sheriff, such taking being only a levy upon goods in the possession of the judgment debtor, without any removal thereof or any further interference therewith, can only be maintained upon the theory that the act of the sheriff was a trespass, and that is precisely what the court in *Williams agt. Loundes* decided it was not; and because it was not it was held that a sheriff, under such circumstances as existed in this case, "incurred no peril from the act of levying."

The doctrine that an officer who acts upon appearances of ownership by the debtor, when such appearances are with the consent of the owner of the property, is not liable for a simple levy without a demand or a claim of title by the true owner, has been repeatedly recognized by the courts in cases where the owner of the property has permitted the debtor to mingle them with his own. *Shumway agt. Rutter* (8 *Pickering*, 443), and *Bond agt. Ward* (7 *Mass.*, 123), and many others which can be found establish the rule. The principle upon which all these cases rest is, that the owner of property misleads the officer, and having misled him such owner cannot make the officer liable for an act which he has thus caused. The argument is equally sound if applied to a case like the present. The owner enables the debtor to deceive. He leaves the property in the latter's house, permits him to use it, and thus declare to the world and to the officer in particular, not in words but in acts, which, as declarations, are far more potential, that he is the owner. To hold an officer, who makes under such circumstances a simple levy in good faith, liable for a trespass would encourage a person in deceiving another to his great injury. The law, as it seems to me, cannot be guilty of such injustice.

In *Kelley agt. Scannell* (12 *California*, 73) and *Vose &*

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Company agt. *Stickney* (8 *Minn.*, 75), the precise point under discussion was determined. In both, to use the language of the reporter's syllabus in the latter case, it was held: "Where a person is in possession of, and exercising acts of ownership over personal property of another, the owner cannot, until demand or notice to the sheriff, maintain an action against him for levying upon and taking it under process against the person in possession."

With these two cases directly holding the necessity of a demand to the maintenance of an action of this character under the circumstances proved, and others decided in this state and in other states, establishing a principle clearly applicable to the cause to be decided, it must be held that the defendant is entitled to a new trial. There may, of course, be cases where the sheriff, though the debtor may have possession, would not be justifiable in making a levy. But in a case like the present, where the defendant in the execution has, for month after month, had furniture in his own dwelling in constant and continued use, precisely as though he was its owner, it would be most inequitable to hold that an officer who, with process against him, levies, is guilty of a trespass.

The motion for a new trial is granted, with costs to abide the event. In reaching this conclusion, however, no opinion is expressed upon the point whether there was not sufficient evidence to take the case to the jury upon the question of knowledge by the defendant of the plaintiff's rights when the levy was made. The case was not tried upon any such theory, nor was that question submitted to the jury, but the court held, as matter of law, that the mere levy upon the goods was sufficient to maintain the action, and this, as has been shown, was error.

Livermore agt. Berdell.

N. Y. COMMON PLEAS.

EDWARD LIVERMORE and others agt. ROBERT H. BERDELL.

Discontinuance of action—Order of arrest—When motion, to discontinue should not be granted.

Where plaintiff had commenced an action and obtained an order of arrest against the defendant on the ground of fraudulent representations, which order of arrest had been vacated upon the ground that the alleged fraudulent representations did not apply to the whole cause of action, on motion by plaintiffs for leave to discontinue the action:

Held, that as plaintiff's object in discontinuing is to commence a new action and obtain a new order of arrest, the order of arrest in this action having been vacated, leave to discontinue should not be granted.

The courts are opposed to arresting a defendant twice for the same cause of action.

Special Term, January, 1881.

EDWARD LIVERMORE, Henry Clews and J. Livermore, stock-brokers, brought a suit in April, 1877, in the court of common pleas, against Robert H. Berdell, formerly president of the Erie Railway Company, to recover a balance of account, as his broker, upon stock transactions between November, 1876, and April, 1877. An order of arrest was obtained against Mr. Berdell, upon affidavits that in February, 1877, he induced the firm to buy for him 200 shares each of Western Union and Lake Shore stock, upon the false representation that he was the owner of 200 shares of National Trust Company's stock, which was hypothecated at the Third National Bank for a loan of \$15,000, and that he would give these shares as collateral on the purchase to be made by plaintiffs.

The defendant appealed from an order refusing to vacate the order of arrest, which appeal was not heard until last Wednesday. The general term reversed the order, upon the ground that the alleged fraudulent representations upon which

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the order of arrest was obtained did not apply to the whole cause of action, inasmuch as the balance of account sued upon extended to a date prior to such representations. The plaintiffs then moved for leave to discontinue the action, upon which motion the following decision was given yesterday :

Abbott Bros., for plaintiffs.

Taylor & Parker, for defendant.

J. F. DALY, J.—As defendant has interposed a counter-claim, it is not a matter of course that plaintiff shall be allowed to discontinue, but the order is discretionary. Plaintiff's object in discontinuing is to commence a new action and obtain a new order of arrest, this order of arrest in this action having been vacated. Leave to discontinue should not be granted for that reason. The courts are opposed to arresting a defendant twice for the same cause of action (*See Wright agt. Rutterman*, 1 Abb. [N. S.], 428, 431, 432; *Enoch agt. Ernst*, 21 How. P. R., 96). If the plaintiff's action were not maintainable, he should be allowed to discontinue, and a new order of arrest for a new action might be granted (*People agt. Tweed*, 63 N. Y., 202). But if the second action be brought merely for the purpose of arresting defendant, after plaintiff has failed through his own fault to sustain the first arrest, the proceedings in the second action might well be regarded as intended only to vex and harass defendant.

The motion to discontinue must be denied, with ten dollars costs.

Burnham *et al.* agt. Brennan.

N. Y. SUPERIOR COURT.

BURNHAM *et al.* agt. BRENNAN.*Replevin — Survivor — Effect of section 1736 of the Code of Civil Procedure.*

Section 1736 of the Code of Civil Procedure, continuing an action of replevin, notwithstanding the death of either party, in favor of or against his executors or administrators, applies only to actions in which the sole defendant was living on September 1, 1880, and is not retroactive.

Special Term, February, 1881.

TRUAX, *J.* — This is a motion made by Mrs. Brennan, administratrix of Matthew T. Brennan, deceased (the late sheriff), to revive the above action. The action is one of replevin brought against the late sheriff. It was tried on the 22d day of November, 1875, and resulted in a verdict for the defendant. Appeals were taken, and on the 23d day of May, 1878, the court of appeals reversed the judgment and ordered a new trial. Mr. Brennan died on the 20th day of January, 1879.

Prior to the 1st day of September, 1880, on which day the last nine chapters of the Code of Civil Procedure took effect, an action of replevin rebated by the death of the sole defendant, and could not be revived by or against his representatives. It could, however, be revived by or against the representatives of the plaintiff (*See Lahey agt. Brady*, 1 *Daly*, 443; *Hopkins agt. Adams*, 6 *Duer*, 685; *Burkle agt. Luce*, 1 *N. Y.*, 163; *Heinmuller agt. Gray*, 2 *Y. & S.*, 196; *Potter agt. Van Vranken*, 36 *N. Y.*, 619). Section 1736 of the Code of Civil Procedure provides that: "In an action to recover a chattel, the cause of action survives or continues, notwithstanding the death of either party, in favor of or against his executors or administrators." The plaintiff contends that this section applies only to actions in which the sole defendant was living on the 1st day of September, 1880; while, on the other hand,

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the defendant contends that the section affects a remedy and not a right, and is retroactive.

Section 3352 of the Code of Civil Procedure declares that "nothing contained in any provisions of this act * * * renders it ineffectual or otherwise impairs * * * any right, defense or limitation lawfully accrued or established before the provision in question takes effect, unless the contrary is expressly declared in the provisions in question. As far as it may be necessary for the purpose of * * * enforcing or protecting such a right, defense or limitation, the statutes in force on the day before the provision takes effect are deemed to remain in force notwithstanding the repeal thereof."

Section 755 and 757 of the Code of Civil Procedure limit the powers of the courts to revive an action to cases in which the cause of action survives.

The motion must be denied, with ten dollars costs.

SUPREME COURT.

NATHANIEL M. FREEMAN, as trustee, &c., agt. ALBERT R. SMITH *et al.*

Will—Effect of a devise of real estate to wife for life, and direction that upon her death it be sold and distributed among his children or their legal representatives—Who to be included in the distribution.

Where the testator devised real estate to his wife for life, and directed that upon her death it should be sold and the proceeds distributed among his three children or their legal representatives, the interest vested in each of them as personal estate, and the share of a daughter who died before and that of a son who died after the widow, passed to their next of kin, so that, although it is plain the testator had no intention the children of the half blood should receive any portion of his estate, they must be included in the distribution.

Special Term, January, 1881.

Freeman agt. Smith *et al.*

BEACH, J. — The testator devised his real estate to his wife for life, and at her decease directed a sale by the executors and the investment of a sufficient portion of the proceeds to produce four dollars a week for his daughter Seraphina, the balance to be divided between his other children, Josephine, Albert and Jerome, "or their or either of their legal representatives, him, her or them surviving." After the death of the daughter the disposition of the fund invested for her benefit was in the same words. The testator's wife had three children by a former husband. The daughter Josephine died intestate and without issue before, and the son Jerome after the widow. The principal question relates to the disposition of the surplus at present existing after the investment for the benefit of Seraphina, and an expression of opinion by the court is requested to guide the trustee in his action after her death.

It is clear that the widow took a life estate in the realty, and the children named a vested interest in the proceeds of the sale after her death. It is evident from the clause the testator intended the benefit given to each child for his or her legal representatives, and the additional words do not modify that design, but were apparently added by the scrivener as usual legal phraseology, which were inapplicable and meaningless. The bequest over to the children was a gift of personalty, because the division was not to be made until after the realty was sold under the power conferred upon the executors. Real estate directed by a will to be converted into money and the proceeds applied as directed is, in equity, regarded as personal property (*Bramhall* agt. *Ferris*, 14 *N. Y. R.*, 41; *Teed* agt. *Morton*, 60 *N. Y. R.*, 507; *Moncrief* agt. *Ross*, 50 *N. Y. R.*, 431; *Forsyth* agt. *Rathbone*, 34 *Barb.*, 388; *Johnson* agt. *Bennett*, 39 *id.*, 237; *Irish* agt. *Husted*, *id.*, 413).

The equitable conversion does not take place until the time arrives when, under the direction in that behalf, the sale should be had. Whatever vested interest may pass by the death of a distributee prior to that period, even if in realty, is subject to be divested by the coming of that time. Therefore,

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if by the death of Josephine before the widow such an interest went to her heirs, it has been divested by the death of the widow and the equitable conversion happening upon that occurrence. The only conclusion which could affect parties here would be that the interest of Josephine passed to her heirs as realty unaffected by the direction for a sale and division, because in such case the relatives of the half blood would not take under the statute, not being of the blood of the ancestor. Such a view, however, cannot be sustained. Under the provision ordering a sale on the death of the widow and distribution of the proceeds among the three children of the testator, or their legal representatives, the interest vested in each of them as personal estate, and the shares of the one who died before and that of the one who died after the widow, passed to their next of kin (*Harris agt. Slaght*, 46 *Barb.*, 470; *Meakings agt. Cranwell*, 5 *N. Y. R.*, 136; *Ross, adm'r, &c. agt. Roberts*, 9 *Sup. Ct. R.*, 90; *Lieper agt. Thansan*, 10 *P. F. Smith*, 177; *McClure's Appeal*, 22 *id.*, 414; *Fairly agt. Kline, Pennington*, 754; *Reading agt. Blackwell, Baldwin*, 166; *Rinehart agt. Harrison's Ex'rs, id.*, 177; *Loftis agt. Grant*, 15 *Arkansas*, 680; *Brothers agt. Cartwright*, 2 *Jones' Equity*, 113; *Homers' Appeal*, 6 *P. F. Smith*, 405). It follows from this principle that the share of Josephine must be distributed to her next of kin, including those of the half blood. This seems to be a clear legal result from the will, and in such case no embarrassment should arise from speculations regarding the testators intentions, however useful, where ambiguity exists. The portion of the son who died after the widow, intestate and without issue, will take a like course, as will also the invested fund upon the death of Seraphina. Under some circumstances there would be much force in the suggestion that it is plain from the will the testator had no intention the children of the half blood should receive any portion of his estate. That may well be so, but it affords no reason why legal results founded upon a long series of adjudications should be disregarded in order that a testamentary dis-

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position should flow in a channel different from one the law makes from wording free of doubt.

A decree is directed in conformity herewith, with costs from the fund.

N. Y. COMMON PLEAS.

In the Matter of EDWARD BENSON.

*Arrest — Liability of one partner for frauds committed by another partner —
Discharge — Burden of proof.*

Though each partner is liable to arrest for the frauds committed by the other members of the firm, although he may have been entirely ignorant of such frauds; yet, upon application by a member to be discharged from imprisonment under the provisions of the Revised Statutes, it being the duty of an opposing creditor to show that the proceeding upon the part of the prisoner is not just and fair, personal participation in the fraud by the applicant is required to be proved in order to justify the court in denying such discharge.

A judgment, therefore, that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property, does not necessarily preclude his discharge as one of the partners.

General Term, February, 1881.

Before C. P. DALY, Ch. J., VAN BRUNT and BEACH, JJ.

S. F. Kneeland, for opposing creditor, appellant.

George W. Wingate, for petitioner and respondent.

VAN BRUNT, J. — The petitioner, having been imprisoned under an execution, presented his petition to this court to be discharged from imprisonment under the provisions of the Revised Statutes. Certain evidence was taken in that proceeding, and upon that evidence the court ordered his discharge.

It seems to be conceded that the firm of which the petitioner was a member made certain fraudulent disposition of

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its property prior to its failure, and the question involved in this application is the determination as to whether the petitioner participated in those frauds or not. The appellant seems to misapprehend the burden of proof upon this issue. The statute provides that unless the opposing creditor shall be able to satisfy the court that the proceedings on the part of the prisoner are not just and fair, the court shall order an assignment and grant a discharge. Every presumption, therefore, is in favor of the application, and the opposing creditor must show by competent proof that the proceedings upon the part of the petitioner are not just and fair. It is not sufficient that the opposing creditor should show that the firm of which the petitioner is a member have been guilty of fraud, but it is necessary to show that the petitioner himself has participated in that fraud.

An examination of the evidence in this case fails to establish that the petitioner Benson was a participant in any of the frauds which were perpetrated by the firm of which he was a member prior to its failure, or that he in any manner knowingly participated in the fruits of that fraud.

It was urged by the counsel for the appellant that the judgments in the cases in which the orders of arrest and executions were issued, make this question *res adjudicata*.

Each partner is liable to arrest for the frauds committed by the other members of the firm, although he may have been entirely innocent of such frauds.

In the statute regulating the discharge of imprisoned debtors, the duty is imposed upon the opposing creditor to show that the proceedings upon the part of the prisoner are not just and fair. Consequently a judgment that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property does not necessarily preclude the discharge of one partner, because the statute regulating such discharges requires evidently personal participation in the fraud of the applicant in order to justify the court in denying such discharge.

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I have been unable to satisfy myself upon an examination of the testimony in this case that the petitioner was cognizant of the apparent conspiracy of his copartners to defraud the persons of whom they should buy goods prior to their failure.

I think, therefore, that the order appealed from discharging the petitioner should be affirmed, with costs and disbursements.

C. P. DALY, Ch. J., and BEACH, J., concur.

N. Y. SUPERIOR COURT.

THEODORE A. HAVEMEYER agt. LAWSON N. FULLER.

Slander — action for — Complaint — insufficiency of.

Where the complaint was founded upon the alleged false and malicious statement that he, plaintiff, adulterated sugar, that he cheated the government, and that, being guilty of cheating the government, he swore that he did not do so:

Held, that these three charges are neither singly nor collectively actionable *per se*, but may become actionable by reason of surrounding circumstances to be pleaded and proved, from which the fair inference can be drawn that the words used were spoken and understood in such a way as to presumptively work an injury.

Held, further, that where these surrounding circumstances are not set forth, the meaning of the words cannot be enlarged by pleading an innuendo, for the office of an innuendo is by a reference to a preceding matter, to fix more precisely the meaning.

It may help to explain, but it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred. It cannot be used to establish a new charge, for it is not the nature of an innuendo to beget an action.

As an innuendo cannot perform the office of a colloquium, showing by extrinsic matter that the words charged are actionable cannot be supplied by an innuendo attributing to those words a meaning which renders them actionable.

Where the special damage is the foundation of the cause of action, it is a material allegation and must be fully and accurately stated.

Where, as in this case, the complaint on its face shows that the only manner in which the plaintiff is engaged in business is as a member of a

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business firm, the name of the firm not being given nor the interest of the plaintiff. For all that appears, plaintiff's name may not appear in that firm name. It sufficiently appears, however, that the loss complained of is not a loss directly to the plaintiff, but to the firm:

Held, that even if it be conceded, as a general proposition, that in case of slander against a member of a partnership individually, he is the proper party plaintiff, even though the firm be also injured by the speaking of the words, it is nevertheless necessary, especially where the words become actionable only by reason of their influence in plaintiff's calling, that the injury to plaintiff's interest should be specially averred. A plaintiff who brings an action for slander, by which he lost his customers in trade, ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false. The general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury.

Trial Term, February, 1881.

THE plaintiff complains of the defendant as follows:

1. The plaintiff is and for many years past he has, as a member of a business firm, been engaged in the business of refining sugar in and near the city of New York.

2. On the evening of January 6, 1879, the defendant procured to be held at Chickering Hall, in the city of New York, a public meeting of a large number of persons engaged in the sugar business — purchasers of sugars, importers of sugar, refiners of sugar and others dealing therein.

3. At such public meeting the defendant, in an address then and there made by him, and in the presence and hearing of those who were there assembled, and with the intent to cause it to be believed that the charges were true, willfully and maliciously made against the plaintiff the false, injurious and defamatory statement that, and in the words "Mr. Havemeyer adulterated sugar" (meaning that sugars refined by the firm of which the plaintiff is a member, were adulterated by the plaintiff in the process of refining); that "Mr. Havemeyer cheated the government" (meaning that in the matter of paying duties upon imported sugars and of selling sugars for export, in which case there is a right to drawbacks from the government of the

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United States, the plaintiff was guilty of cheating and of the crime of violating the laws of the United States in such case made and provided), and that "Mr. Havemeyer, being guilty of cheating the government, swore that he did not do so" (meaning that the plaintiff was guilty of perjury in the testimony given by him before a committee of the house of representatives of the United States in the city of New York, in the month of September, 1878).

4. The charges thus made by the defendant against the plaintiff were false and defamatory, and were willfully and maliciously made with intent to injure and damage the plaintiff.

5. The defendant well knew and intended that the false and defamatory charges thus made by him would be published in the public newspapers; the same were so published and have been and will be widely circulated among those with whom the plaintiff and his firm have been in the habit of doing business.

6. By reason of the premises the plaintiff has sustained and will sustain serious loss in his business through the indisposition of purchasers to buy sugars as to which the charge is made that they are adulterated, and in consequence he will lose profits which otherwise would be realized to him, and he has been otherwise injured in his business and reputation to his damage \$100,000.

Wherefore, &c.

Horace Secor, Jr., for defendants. The complaint should be dismissed. 1. The alleged charges do not constitute slander *per se*, and there is no allegation of special damage. Plaintiff attempts by innuendo to enlarge the meaning of the charges. This he cannot do (*Townsend, Slander*, [3d ed.], secs. 335 and 336; *id.*, p. 581, n. 4; 582, n. 2, sec. 337). The third charge that plaintiff, being guilty of cheating the government, swore that he did not do so. This is not *per se* actionable (*Id.*, sec. 171, and cases cited; *Vaughn agt. Havens*, 8

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Johns., 109). The second charge, that plaintiff cheated the government. This is not *per se* actionable (*Chase agt. Whitbeck*, 3 *Hill*, 140). The first charge, that plaintiff adulterated sugar. For aught it appears the charge may have been that plaintiff adulterated sugar for his own use or for amusement. There is no colloquium that the words were uttered in an address in reference to or concerning the refining and sale of sugar by the plaintiff. This is fatal (*Towns. sec.* 323; *Van Vechten agt. Hopkins*, 5 *Johns.*, 220). This motion does not admit the innuendoes (*Towns.*, *sec.* 362). Section 535 of the Code does not help the complaint (*Towns.*, *sec.* 310; *Wallace agt. Bennett*, 1 *Abb. N. C.*, 478). There is no allegation of special damage (*Linden agt. Graham*, 1 *Duer*, 670; *Hallock agt. Miller*, 2 *Barb.*, 630; *Tobias agt. Harland*, 4 *Wend.*, 537; *Stiebling agt. Lockhaws*, 21 *Hun*, 457). 2. There is no allegation of want of probable cause for the alleged charges. As appears from the face of the complaint, the occasion on which these alleged charges were made makes out a conditionally privileged communication (*Klinck agt. Colby*, 46 *N. Y.*, 433; *White agt. Nicholls*, 3 *How. [U. S.]*, 266), and in order to obviate the claim of privilege, malice in fact and want of probable cause must be alleged (*Id.*; *Cook agt. Hill*, 3 *Sandf.*, 341; *Viele agt. Gray*, 10 *Abb.*, 1; *Towns.*, *sec.* 426).

FREEDMAN, J.—The assurance given by the learned counsel for the plaintiff, and made after consultation with his client, that my decision on the motion to dismiss, no matter what it might be, would not be excepted to, has had an embarrassing effect on me. It involved as high a compliment as can be paid to the acumen and conscientiousness of a judge, and as such I shall always remember it. But at the same time I felt that it imposed upon me the correlative duty of exercising more than ordinary care in coming to a conclusion. I felt that on waiving his right of appeal the plaintiff had the right to expect a decision which should be well considered and in accord with the weight of the authorities. I consequently

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made a careful examination of the questions involved since the adjournment of the court on Friday last, and the conclusions at which I arrived are as follows :

The complaint is founded upon the alleged false and malicious statement that he, plaintiff, adulterated sugar ; that he cheated the government, and that being guilty of cheating the government, he swore that he did not do so. These three charges are neither singly nor collectively actionable *per se*, but may become actionable by reason of surrounding circumstances, to be pleaded and proved, from which the fair inference can be drawn that the words used were spoken and understood in such a way as to presumptively work an injury. Where these surrounding circumstances are not set forth, the meaning of the words cannot be enlarged by pleading an innuendo, for the office of an innuendo is by a reference to preceding matter to fix more precisely the meaning. It may help to explain, but it cannot enlarge the meaning of words unless it be connected with some matter of fact expressly averred. It cannot be used to establish a new charge, for it is not the nature of an innuendo to beget an action.

Under the circumstances of this case, the plaintiff, in order to make the innuendoes pleaded available, should have shown in the first place that the words complained of were spoken of and concerning him in his business relation as a sugar refiner ; but the complaint contains no such averment, though the fact is alleged that the plaintiff is, and for many years past he has, as a member of a business firm, been engaged in the business of refining sugar in and near the city of New York. As an innuendo cannot perform the office of a colloquium, showing by extrinsic matter that the words charged are actionable cannot be supplied by an innuendo attributing to those words a meaning which renders them actionable. The complaint is defective in this respect, unless the want of a direct averment has been supplied by other allegations from which it appears with sufficient certainty that the speaking of the words was in fact of and concerning the plaintiff in his

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business relation as a sugar refiner. I do not deem it necessary, however, to pursue inquiry in that direction, because there is another and more important point which is decisive. I refer to the insufficient allegation of damage. The complaint avers that by reason of the premises the plaintiff has sustained and will sustain serious loss in his business, through the indisposition of purchasers to buy sugars as to which the charge is made that they are adulterated, and in consequence he will lose profits which otherwise would be realized to him; and he has been otherwise injured in his business and reputation to his damage \$100,000.

At the same time the complaint on its face shows that the only manner in which the plaintiff is engaged in business is as a member of a business firm. The name of that firm is not given, nor the interest of the plaintiff therein. For all that appears, plaintiff's name may not appear in that firm name. It sufficiently appears, however, that the loss complained of is not a loss directly to the plaintiff, but to the firm. Even if it be conceded, therefore, as a general proposition, that in case of slander against a member of a partnership individually, he is the proper party plaintiff, even though the firm be also injured by the speaking of the words, it is nevertheless necessary, especially where the words become actionable only by reason of their influence in plaintiff's calling, that the injury to plaintiff's interest should be specially averred. This has not been done, and no facts or circumstances are even pleaded from which the deduction can be made that the damage alleged is the natural and probable effect of the words spoken upon the business of the firm. As already said, it is not shown that plaintiff's name appears in that of his firm, or that his connection with it is of such a character that it suggests itself to the minds of the customers of the firm by a mere mention of the name, so the adulterations charged cannot, in the absence of all explanatory circumstances, be presumed to have injuriously affected the business of the firm. It may be that in refining sugar purifying agents

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are necessarily or usually employed, and their admixture may, in a certain sense, be deemed an adulteration of the sugar. Facts, therefore, should have been pleaded from which it might be seen that the natural and probable effect of a bare charge of adulteration, which does not disclose the manner, extent, object or purpose of the adulteration, is to injuriously affect the business of a sugar refiner.

In any aspect that can be taken of the complaint in this action the plaintiff's right to recover depends upon the question whether he sustained special damage. This being so, the rule applies that where the special damage is the foundation of the cause of action it is a material allegation and must be fully and accurately stated (*Vanderslice* agt. *Newton*, 4 *Comst.*, 133; *Solms* agt. *Lias*, 16 *Abb.*, 311) or the plaintiff cannot prove it on the trial (*Law* agt. *Arther*, 2 *Kern*, 282; *Squire* agt. *Gould*, 14 *Wend.*, 159). Thus, in *Hallock* agt. *Miller* (2 *Barb.*, 630), it was decided by the Albany general term (HARRIS, PAIGE and PARKER, JJ.) that in all actions for slander by which the plaintiff lost his customers in trade, the plaintiff cannot prove that any persons not named in the declaration left off dealing with him in consequence of the words spoken (*In re Hartley* agt. *Herring*, 3 *Term Rep.*, 133).

LORD KENYON says that a plaintiff who brings an action for slander by which he lost his customers in trade ought, in his declaration, to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false.

In *Tobias* agt. *Harland* (4 *Wend.*, 537), which was an action to recover damages for slanderous words spoken of articles manufactured by the plaintiff, whereby divers persons refused to purchase them, MARCY, J. held: "Special damages are not so alleged in the declaration, that proof of them could be received on the trial. The general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury. If the plaintiff in this suit can recover at all, it must be because the words are actionable in themselves."

And in *Linden* agt. *Graham* this court held at general term

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(February, 1853, OAKLEY, Ch. J., CAMPBELL and BOSW., JJ.), that in action for slander of title, whereby the plaintiff was prevented from obtaining a loan on the mortgage of the property or from selling it, it is essential to stating a cause of action to name the person or persons who refused for that cause to loan or purchase, and that if not named it is demurrable on the ground that no cause of action is stated. In this conclusion the judge who made the order appealed from concurred (See, also, Kendall agt. Hone, 1 Seld., 14; Shipman agt. Burrowes, 1 Hall, 399; Terwilliger agt. Wands, 17 N. Y., 54; The Knickerbocker Life Ins. Co. agt. Ecclesine, 34 N. Y., Superior Ct. [2 J. & Sp.], 76). According to these authorities the statement of damage contained in the complaint is not a sufficient statement of special damage, and consequently the complaint must be dismissed.

This result, arising purely from the pleadings in the case, may be a disappointment to the plaintiff, especially as it carries costs against him, because he was driven into the commencement of this action by a desire to vindicate himself and the large interests he represents against the charges made by the refusal of the defendant to retract them when called upon. But he may console himself somewhat by considering that the testimony so far given upon this partial trial has substantially vindicated him. The defendant, when called as a witness on behalf of the plaintiff, distinctly admitted that he had no personal knowledge of the charges made; that they were made in the heat of a debate upon the question of revision of the tariff; and that in the main they were directed more against the sugar refiners, as a class, than against the plaintiff in particular; and that even as to them, as a class, he had no other information except what certain government reports furnished and certain officials had remarked.

Under these circumstances, and especially as I am of the opinion that the defendant could have avoided the institution of the action by a retraction, no motion for an allowance will be entertained.

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SUPREME COURT.

THE PEOPLE *ex rel.* JOHN S. HASSELL agt. HENRY HOFFMAN.

Constitutional law — What is a local bill within the meaning of section 18, article 3 of the constitution.

An act of the legislature, providing for the length of the term of office of supervisors in four counties of the state, is a local bill within the meaning of section 18 of article 3 of the constitution, and is therefore void. Chapter 253 of the Laws of 1878 held unconstitutional.

Albany January Circuit, 1881. WESTBROOK, justice, presiding.

THIS was an action brought to test the title to the office of supervisor of the first ward of the city of Albany. At the charter election held in April, 1879, the defendant was duly elected to such office and entered upon its duties. At the charter election held in May, 1880, the relator Hassell received 539 votes and the defendant 519 votes for supervisor of said ward. The defendant afterwards continued to discharge the duties of supervisor, under the claim that he was elected for two years at the election held in April, 1879. The relator claimed that the defendant held office for one year only, and that chapter 253 of the Laws of 1878, extending the term to two years, was unconstitutional.

Nathaniel C. Moak and *Edward J. Meegan*, for plaintiff and relator.

Rufus W. Peckham, for defendant.

In announcing his decision, WESTBROOK, J., said: "Since this cause was submitted to me, I have found it impossible to prepare a written opinion, owing to the pressure of the circuit.

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“The action involves the constitutionality of chapter 253 of the Laws of 1878, entitled ‘An act relating to the term of office of the supervisors of the counties of Albany, Livingston, Rensselaer and Monroe.’ That act provides that the supervisors in these counties ‘shall be elected and hold office for a term of two years,’ and repeals ‘all acts or parts of acts inconsistent therewith, so far as the same apply to the counties of Albany, Livingston, Rensselaer and Monroe.’

“The defendant claims the office of supervisor of the first ward of the city of Albany under an election in 1879, alleging that his term, by virtue of such election, was two years.

“The relator insists that the act of 1878 is unconstitutional, by virtue of article 3, section 18, of the constitution of this state, which declares ‘the legislature shall not pass a private or local bill in any of the following cases: * * * Providing for election of members of boards of supervisors,’ and that therefore his election to the office of supervisor from the same ward in 1880 was valid.

“The learned counsel for the defendant, whilst not denying that the act under which his client claims title to the office is a ‘local’ one, nevertheless insists that it is simply an act extending the term of office of supervisors in the counties mentioned therein, and that it does not provide for their election, which is covered by the general statutes on that subject.

“I cannot, however, regard this argument as sound. It is true that the statute in question does not prescribe the mode and manner of election, but it does provide for an election in these counties to fill the office of supervisor once every two years, instead of an annual one, and is therefore obnoxious to the constitutional prohibition.

“A reading of the act will show that even its language is not in harmony with the view of the counsel for the defendant. It in words does not only profess to lengthen or extend the term of office, but it also in terms declares that the supervisors from the counties specified ‘shall be elected and hold

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office for a term of two years.' This, perhaps, is only a refined criticism. Whether a law only professes to provide for the lengthening of a term of office, or whether it declares how often the election is to be held, in either case, when the office is one which is filled by the popular vote, it does in fact and in substance provide for the election, because it declares two things: First. That the people shall elect the officer from the district prescribed by the law; and, second, the period which elapses between each election.

"For these reasons judgment ousting the defendant from the office of supervisor of the first ward of the city of Albany must be rendered, and also declaring that the relator, John S. Hassell, is entitled thereto."

The jury thereupon, by direction of the court, returned a verdict as follows:

"That the defendant Henry Hoffman has, since the first Tuesday of May, 1880, usurped, intruded into and unlawfully held and exercised the office of supervisor of the first ward of the city of Albany, that he be ousted therefrom, and that the relator, John S. Hassell, is, and since said first Tuesday of May, 1880, has been entitled to occupy, hold and exercise the said office of supervisor, by virtue of the election in the complaint mentioned, and they find generally for the plaintiff and the relator."

NOTE. — This case was affirmed at the general term, third department.
[REp.]

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N. Y. SUPERIOR COURT.

WILLIAM M. DAVIDSON agt. E. R. HOLDEN *et al.*

The owner of a cargo in a barge may recover for a loss against the owners of the steamboat towing the barge for negligence, although there is no privity of contract. Unseaworthiness of the barge not necessarily a defense to this action, nor overloading.

Where a barge is towed by a steamboat, the steamboat is the superior mind, and the captain of the barge cannot prevent the pilot of the steamboat from going out. The assent or dissent of such a captain as to proceeding on the voyage is scarcely material.

If the contractor or freighter is negligent in providing an unseaworthy barge, the shipper may, nevertheless, either sue him or his sub-contractors (the owners of the steamboat), in case of loss by stress of weather, occasioned as well through the negligence of the sub-contractors as through the inherent unsoundness of the barge.

The owners of the steamboat are responsible to the shippers for negligence in going out in stormy weather, and thus occasioning loss of cargo, although there is no privity of contract between them.

The overloading of the barge, or the barge's unseaworthiness being evident to, or known of by, defendant's pilot, are no defense here.

Trial Term, April, 1880.

DEFENDANTS were the owners of a steamboat known as the "William J. Booth."

Plaintiff shipped upon the barge "Warren" a cargo of coal, to be carried by said barge from Hoboken, New Jersey, to Newtown Creek, Long Island, at a certain agreed rate of freight, to be paid by plaintiff to the owners of the barge.

Defendants contracted with the owners of the barge to tow said barge, with other barges, from Hoboken to Newtown Creek, for a certain towage, to be paid by the owners of the barge.

The steamboat proceeded to tow the "Warren" to Newtown Creek, but the sea being rough the "Warren" shipped

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a quantity of water, in consequence of which the "Booth" put in at pier No. 3, North river, where the water shipped was pumped out. Nevertheless the steamboat again put out with the tow in charge, and the "Warren" became filled with water and sunk, and her cargo of coal was thereby lost.

The defendants' witnesses testify that the captain of the barge insisted on going out the second time, and that the barge was overloaded. Defendants offer testimony to show that the barge was rotten and unseaworthy, and one of defendants' officers stated that he had known the barge for some years, and had for that time known her to be unseaworthy.

W. G. Peckham and E. W. Tyler, for plaintiffs.

Welcome R. Beebe and Edward H. Hobbs, for defendants.

SPEIR, *J.* — There are three parties interested. There is no testimony here that the owner of the coal had anything to do with the defendants' tug, and all he had to do was to deliver his coal on board the "Warren." It was not his duty to see how she was loaded; it was not his duty in this case to see whether the "Warren" was a good vessel. The moment the tow was taken charge of by the tug, that moment the owner of the barge had nothing else to do; because the tug was the superior mind. Then the captain of the tug is the man that is supposed to know the port and the character of the channel, the winds and the weather; and there was no man who could interfere with him when he undertook to tow the "Warren;" that is the law.

Now let us see what the plaintiff could do originally. He could either sue the defendant as he has done, or he could sue the owner of the "Warren."

If the barge was unfit for service, they had just as much knowledge of that fact as the plaintiff who seeks to recover, and more.

There is no evidence here whatever that the plaintiff knew

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anything about the condition of the boat. The defendant's pilot says he had known the "Warren" for two years. Now where is the responsibility? If the defendants, when they undertook to remove that boat in the North river in the morning, saw that the weather was so bad that it was dangerous, and, if they saw it was a boat that would fill through leaks, they had that knowledge, and it was in their power to refuse to take her at all. It was their duty to refuse if they knew she was not a fit vessel. They could not have been compelled to take her, and when they did take her, they undertook a responsibility which they were bound to discharge.

You will perceive at once that the owner of the "Warren" could not say anything. He had not the management of her; he had committed her care entirely to the captain and to the navigators of the tug.

I lay down this rule of law to guide you in determining these questions about which there has been a variety of opinions (one side claiming that the boat was in a wretched condition and the other side maintaining that it was seaworthy). Assuming that the "Warren" was not in such a condition as she ought to have been in, it is for you to say did the captain or the managers of the tug know it? What had they done? They had already undertaken to carry that vessel; and it was notice of the weather and of the character of the vessel when they had to put in before they went around the Battery. They started and had put into Pier 3. They had pumped her out. If she was so bad a vessel as that, and if you find that she did put in and that they did pump her out, it is for you to say whether they did not have notice of all her imperfections, and if they did, then all these rules of law must control.

Whatever knowledge of the barge the defendant's pilot and captain in charge had from previously towing her, and from his previous knowledge of the barge that he has testified to, is the same as if the defendants had personal knowledge of the barge.

Verdict for the plaintiff.

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SUPREME COURT.

THE PEOPLE *ex rel.* SARAH L. BURNET agt. DANIEL JACKSON,
auditor, and JOHN KELLY, comptroller.

New York (city of) — Powers of trustees of New York College — Their vouchers conclusive on the comptroller of the city — Finance department will be compelled by mandamus to audit them.

The College of the City of New York is a distinct corporation having no dependence on the city.

The finance department of the city is merely the custodian of the funds raised by taxation for the college.

The vouchers of the college trustees are conclusive on the finance department.

Mandamus will lie against the comptroller to compel the audit of such vouchers.

First Department, General Term, February, 1881.

APPEAL from order of the special term denying an application for a *mandamus*.

Paul Fuller (Coudert Brothers), for appellant.

F. L. Stetson (Wm. C. Whitney, corporation counsel), for respondents.

DAVIS, *P. J.* — The facts upon which this application is based are as follows :

Edward E. Burnet, late husband of the relator, had been engaged in teaching in the public schools of this state for twenty-four years prior to his decease, and for the last eleven or twelve years as a teacher in the College of the City of New York. As such teacher he was employed at an annual salary of \$2,375, payable in equal monthly installments. In the month of April, 1879, and while engaged as such teacher, he died ; and his salary, up to that date, has been paid. On the

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24th day of June, 1879, the executive committee of the college adopted a resolution by which it was resolved that the salary of Mr. Burnet be paid from the date of his death until September 1, 1879, to his widow or legal representative, and afterwards the board of trustees of said college, at a meeting duly held, adopted the same resolution. Whereupon an account or voucher was made up in due form by the officers of the board of education, and the board of trustees of the college, and sent to the finance department for audit by the auditor, and for the issuing of the proper warrant by the comptroller. Those officers refused to audit the same and to issue a warrant therefor, on the ground that the claim "presented by the relator is in effect a claim for a gratuity or gift from the public treasury for an amount equal to the salary of her late husband for the period subsequent to the day of his death and prior to the 1st day of September, 1879, and such claim does not constitute a legal claim upon the public treasury.

The court below held that the objection of the auditor and comptroller was well taken, and that the city had a right through them to assert the gratuitous character of the claim as a defense.

It is not disputed that the fund authorized to be raised under chapter 471 of the Laws of 1872 had been raised and paid into the city treasury for the use of the trustees under the direction of the board of education as required by law. There can be no doubt that the College of the City of New York, as organized by chapter 264 of the Laws of 1866, is a body corporate, with the full powers and privileges of a college, conferred by the Revised Statutes of this state, and that the trustees of the college are endowed with all the powers conferred upon trustees of colleges by such statutes. It is in no legal sense a department of the city of New York, but is an independent corporation, not subject to the control, management or visitation of the authorities of the city, except as may be specially provided for and permitted by the legislature.

The moneys authorized to be raised for the support of the

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college became, when so raised and paid into the city treasury, a fund exclusively devoted to such uses and purposes, and the city authorities have no control over the same in any manner to divert or dispose of them. It was held, however, in *Dannatt agt. The Mayor*, 66 N. Y., 585, that having been paid into the city treasury they cannot be drawn out except with the forms prescribed by section 34 of the charter of 1873, which provides that no moneys shall be drawn out of the treasury except upon a warrant of the comptroller, and that no warrant shall be signed by the comptroller except upon vouchers examined and allowed by the auditor and filed in the department of finance. Those provisions, however, did not change the character of the fund. The money still remains a "distinct and independent fund," as was said by this court in the *People ex rel. Kedian agt. Neilson* (5 T. & C., 367), "devoted to the support and maintenance of that institution, which cannot lawfully be diverted to another use." The disposition of that fund is by law conferred altogether upon the trustees of the college and the board of education of the city of New York, and no supervisory or inquisitorial control over the same is given to the finance department of the city. The responsibility for its proper distribution in conformity to law rests altogether upon the trustees of the college and the board of education, who for any abuse of their power or discretion may be prosecuted or restrained in a proper manner and in a proper forum, but are not subject to be reviewed or controlled by the auditor or comptroller of the city.

This question was lately before the court in the *People ex rel. Little agt. Kelly*. In that case the board of excise had audited and allowed a bill in favor of a relator for 100 copies of a printed list of liquor dealers at the sum of \$1,386.17, and proper vouchers therefor were presented to the auditor and comptroller for the payment out of the excise funds in the city treasury. Those officers refused to audit and pay the same, on the ground that the expense was unnecessary

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and the amount excessive. It was held that these questions did not belong to the financial department of the city, because the fund in the treasury was subject to the exclusive disposition of the board of excise, and, in substance, that the auditing and allowing of the claim by that board were conclusive upon the auditor and comptroller. That case is in principle decisive of the one before us. A similar principle was determined by the court of appeals in the *People ex rel. Murphy agt. Kelly* (76 N. Y., 490), in which it was held that the comptroller had no power to refuse to take the steps prescribed by the law to raise money for the building of the Brooklyn bridge, on the grounds that, in his judgment, the bridge was not properly constructed, and could not be completed within the sum limited by the legislature.

It is not necessary for us to determine, therefore, whether the trustees of the college and the board of education had power to allow to the widow of the deceased teacher the salary that would have accrued to him for the current year of the school. In their discretion it was thought to be a wise and prudent disposition of the fund, under the peculiar circumstances of the case, in view of his long and faithful services, and the probability that his death had been hastened by his devotion to the duties of his employment. The legislature has seen fit to make them the depositaries of that discretion, and if in their judgment the interests of public education would be advanced and encouraged by such an allowance, we have no desire or disposition to condemn or criticise it.

In the view we have taken of the case, the court below should have granted the mandamus.

The order must be reversed, and an order entered directing the mandamus to issue.

BRADY and BARRETT, JJ., concurred.

Derham agt. Lee.

N. Y. SUPERIOR COURT.

SARAH DERHAM, as administratrix, agt. JOHN LEE, surviving partner of the firm of LEE & DOLAN, and JOHN P. SUNDERLAND.

Practice—Questions of regularity, how and when to be raised—Claim to a right of trial by jury when to be made—Judgment may be for or against any of the parties—Book of a foreign corporation—when evidence—Code of Civil Procedure, sections 521, 929, 930, 931, 1204.

The plaintiff's intestate in his lifetime having recovered judgment by default against the defendant Lee, and then assigned said judgment to one Sunderland, and subsequently the default being opened, and upon death of plaintiff's intestate an order made reviving the action and directing Sunderland to be brought in as party defendant, and the trial having then proceeded before the referee theretofore appointed, by consent, and judgment given in favor of defendant Sunderland against his codefendant Lee:

Held, that the trial having proceeded without objection until the merits of the controversy were determined, no question of irregularity can now be heard, as questions of regularity and practice should be raised by motion, and defendant's claim to a right of trial by jury not having been made before or at the trial, cannot now be listened to.

The referee did not exceed his power in giving to one defendant affirmative relief against his codefendant; sections 521 and 1204 of the Code being sufficient warrant for the decision and judgment.

A copy of an account of defendant's firm as it appeared in the ledger of a foreign corporation, no objection being made for want of proper verification, was properly admitted as presumptive evidence, under sections 929, 930 and 931 of the Code, of the account of work done by the firm for the corporation.

General Term, January, 1881.

Before SPEIR and FREEDMAN, JJ.

APPEAL by defendant John Lee from a judgment entered against him on the report of a referee in favor of the defendant John P. Sunderland, as the assignee of the claim in suit.

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Jones, Roosevelt & Carley, for appellants.

P. & D. Mitchell, for respondents.

FREEDMAN, J.— This action was commenced June 7, 1872, by Michael Derham, as assignee of William B. Jackson, to recover for services rendered by Jackson to the firm of Lee & Dolan, of which the defendant Lee is the surviving partner. Judgment was entered against defendant, and on December 4, 1874, said judgment was duly assigned to John P. Sunderland. Subsequently, Lee had the default opened, and put in an answer which was a general denial. The issues were referred by consent to a referee to hear and determine the same. During the trial the plaintiff died, and the proceedings became suspended in consequence thereof. On February 25, 1878, an order was made and entered reviving the action and directing that it be prosecuted before the referee by Sarah Derham, as administratrix, &c., of Michael W. Derham, deceased; that she make and serve a supplemental complaint, and that John P. Sunderland be made a party defendant. A supplemental complaint was accordingly made and served, based upon the assigned cause of action. Lee again answered by a general denial. Sunderland by his answer admitted the allegations of the complaint, but claimed to be entitled to judgment thereon against Lee as the real owner of the claim. The trial of the action then proceeded again. The referee found Lee liable upon the cause of action set forth in the complaint; and that Sunderland, as assignee, was entitled to judgment thereon against his codefendant Lee, and judgment was entered accordingly, from which Lee appealed.

The appellant insists that upon the facts stated the only decision which the referee could give, and the only judgment which could be directed or entered, was one dismissing the complaint. This objection was not well taken. The order reviving the action and directing Sunderland to be brought in as a party defendant, and that after the joinder of issue upon

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the supplemental pleadings, the trial proceed before the referee theretofore appointed by consent, not having been appealed from, and the trial having proceeded without objection until the merits of the whole controversy were determined, no question of irregularity can be heard on appeal from the first trial.

Questions of regularity and practice should be raised by motion. For the same reason Lee's present claim to a right of trial by jury cannot be listened to, because not made before or at the trial. The only question left, upon this branch of the case, therefore, is one of power; and upon this, sections 521 and 1204 of the Code of Civil Procedure are a sufficient warrant for the decision and judgment. These sections are not to be limited by mere construction to actions of foreclosure, partition and similar actions of a purely equitable character, for the great feature of the Code is, as it was of the prior Code, that but a single form of action is provided for the enforcement of private rights, and that a defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they were such as were formerly denominated legal or equitable. The former requirement that such defenses or counterclaims must not be inconsistent with each other, was stricken from section 507 by the amendment of 1879. So may a defendant claim affirmative relief against a codefendant where by the judgment their ultimate rights, as between themselves, may be determined. Of course the Code prescribes certain limitations within which these rights must be exercised, but among them I can find none which would justify the conclusion that the referee exceeded his power under the circumstances. Nor is there anything in the facts themselves which constitutes a bar to a recovery by Sunderland against Lee. Sunderland became the real owner of the claim after the commencement of the action, and it was perfectly consistent for him to assert in his answer his rights under the cause of action set forth in the complaint both against the plaintiff and the defendant Lee.

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The appellant also insists that the complaint should have been dismissed for want of sufficient proof and that the report of the referee is against the weight of evidence. After a careful examination of the whole case I have come to the conclusion that the appellant's exceptions upon those points are untenable. There was sufficient evidence, if no error was committed in its reception, to sustain the referee's findings and judgment, and I fully concur in the reasons assigned by the referee in his opinion for his conclusions.

The questions remaining to be considered relate to the admissibility of evidence. Upon this branch of the case it is claimed that the referee erred in admitting in evidence the copy of an account of Lee & Dolan, as it appeared in the ledger of the New Haven, Middletown and Willimantic R. R. Co. The claim in suit was for a commission of William S. Jackson in negotiating a contract between Fields, Spinner & Co., and Lee & Dolan. The commission as found by the referee was two per cent on the amount of moneys which Lee & Dolan should receive or be entitled to on said contract, and the copy of the account was offered to prove the amount of work done by Lee & Dolan on the road, for which they received credit. The exhibit was proved to be a copy of the account of Lee & Dolan for work done by them on the road as it appeared in the ledger of the company.

The counsel for the appellant at the trial waived any objection for want of proper verification, and for not having received proper notice of the intention of the adverse party to use such evidence on the trial as prescribed by section 931 of the Code of Procedure, but objected to it on the ground that it was immaterial and incompetent, for the reason that there was no proof when or by whom the entries are made, or that they were correctly made. The objection was overruled and exception taken. The evidence had an important bearing upon the issue to be determined, and hence was not immaterial. Upon the question of competency the objection in the absence of the preliminary proof insisted upon would be

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well taken if the issue had been between the railroad company and Lee & Dolan, and the company had offered the copy, or even the ledger itself, as evidence in its favor. In such event the case would have fallen within the principle laid down in *Bank of Monroe* agt. *Credor et al.* (2 Hill, 531); *Brewster* agt. *Doane and others* (2 Hill, 537); *Burke* agt. *Wolf* (38 N. Y. Supreme C. R., 263); *Ocean National Bank* agt. *Cable* (55 N. Y., 440). But the controversy was between third parties, and the railroad company having been shown to be a foreign corporation, the case fell within the provisions of 929, 930 and 931 of the Code, by which, in such a case, the books of a foreign corporation, or a copy thereof, or a copy of an entry therein, verified in a certain way, are made presumptive evidence for the purpose of proving an act or transaction of the corporation. The legislative intent expressed in this provision is, that in case of the production of an original book the contents of the book should be received as presumptive evidence after preliminary proof of correctness, but that if the original book is not produced, a copy thereof, or a copy of an entry therein may be admitted with the like effect, provided it is verified in a certain way and a certain notice is given. Any objection for want of proper verification or proper notice having been waived, the copy of the account was properly received as presumptive evidence of the account of work done by Lee & Dolan for the company, and for which they have received credit, and the burden of establishing a contrary or different state of facts then rested with the appellant.

There were other objections to the admission of testimony, but they are clearly untenable, and not of sufficient importance to be specially noticed.

The judgment should be affirmed, with costs.

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SUPREME COURT.

FANNIE E. MUSGRAVE, plaintiff and appellant, agt. JOHN H. SHERWOOD, defendant and respondent.

Party-wall—rights of adjacent owners as to—Equitable estoppel—Effect of oral statements and promises made by a vendor during negotiations for the sale and purchase of real estate as to the use to which he would devote his remaining and adjoining property in the future.

Where S., who owned five adjoining new dwelling-houses, represented to M., during negotiations with him for the sale of one of them, that he was restricted from erecting other than first-class private residences on the property, and that they would be, first and last, private residences; and M., relying on these statements, purchased one of the houses as a private residence and permanent home, and then S. enlarged the other houses, not as private residences, but for business purposes, namely, as part of a family hotel:

Held, that though these representations were not incorporated in the deed or in the contract of sale, and were not repeated or alluded to at the time the contract of sale and purchase was made, S. should, in equity, upon M.'s application, be restricted from altering the character of the houses, unless M.'s rights in this respect have been waived.

The use by S. of the existing easement, a party-wall between the house purchased by M. and S.'s house adjoining, for a purpose antagonistical to the expressed design of S. in building the houses, by which the adjoining house was enlarged, not as a private residence, but for business purposes, may be restrained, though S. would have the right to build upon the party-wall if the object were to enlarge his house as a private residence (*Reversing S. C.*, 54 *How.*, 338; *see S. C.*, 53 *How.*, 311). S. is under no obligation to reform the character of the houses other than the one adjoining M.'s, because the changes made prior to the commencement of the action must be regarded as having been assented to by M., because they were allowed to be thus changed without objection.

First Department, General Term, February, 1881.

Before BRADY and BARRETT, JJ.

THIS is an appeal from a judgment entered March 14, 1878, on the decision of justice VAN VORST, dismissing the com-

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plaint, which prayed an injunction restraining defendant from increasing the height of a party wall (*See 54 How.*, 338).

An interlocutory injunction had been issued under an order granted by justice WESTBROOK (*see 53 How.*, 311), an appeal from which is now pending.

The cause was tried at a special term in November, 1877. On the trial, in pursuance of section 1023 of the new Code, plaintiff submitted proposed findings of fact and conclusions of law; afterwards defendant did the same. Thereafter the court filed its decision dismissing the complaint, with costs; although it had previously, by its decision on defendant's proposed statement, and by its opinion, refused costs (*See 54 How.*, 338). Judgment was entered in March, 1878. Plaintiff filed exceptions to the decision.

From the rulings of the court upon the proposed statement by plaintiff, and from its decision, it appears:

First. That on the 15th of December, 1873, defendant being the owner of four dwellings on the east side of Fifth avenue, extending north from Forty-fourth street, 100 feet deep, and fronting on the avenue; and also of a lot adjoining said premises in the rear, fronting on Forty-fourth street, and extending northerly 105 feet, conveyed to plaintiff the premises described in the complaint, being the third dwelling from Forty-fourth street.

The dwelling covered the entire front of the lot. The main portion was sixty-six feet deep, and four stories above the basement, with an extension of twenty-seven feet in depth, fourteen feet nine inches wide, and about twenty-seven feet in height, located on the northerly line of the lot. The deed to plaintiff bounded her on the north and south by the center of party walls then standing. They were twenty inches thick in the sub-basement and sixteen inches above to the surface, which was covered with tin, a chimney with flues for the connected dwellings extended above the party-wall. The purchase-price was \$110,000.

Second. At the time of the deed the said four dwellings

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"were completely finished in an elegant and expensive style. They were uniform in arrangement and finish and each of them belonged to the order of first-class private residences in the city of New York." Since the purchase plaintiff has expended about \$70,000 in improving her dwelling. It was purchased for a permanent family home and has been continually so occupied; "that locality is among the most desirable and costly in the city of New York for that mode of occupation."

Third. The deed to plaintiff was given in pursuance of a written contract between plaintiff's husband and defendant, bearing date December 5, 1873. The grants under which defendant derived title contained restrictive covenants, embracing the heirs and assigns of either party, among other things, forbidding the erection or carrying on of "any tenement-house" or "steam-engine," or "business or calling noxious or offensive to the neighboring inhabitants."

Fourth. Prior to the contract of December fifth, while the parties were inspecting the premises, defendant made, in substance, these statements: "That if they (plaintiff and her husband) purchased the said premises, they would be subject to no nuisances; that there were covenants in the deeds of his own property and the adjacent lots providing against them, and that his remaining houses on Fifth avenue would be occupied as first-class private dwellings."

Justice VAN VORST supposed he had found these facts in his decision filed. He was mistaken. They appear in his opinion. Under section 1023 of the Code, however, the findings upon the statements presented by the respective parties are as effectual and available as if contained in the decision.

Therefore, the finding of the court in regard to these statements disposes of the question of credibility between the plaintiff and her husband and defendant, raised upon the trial. The admission of the answer is not quite consistent with defendant's testimony.

Fifth. Plaintiff and her husband, in making the purchase, relied upon these statements, and would not without them

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have made it. Probably the court did not include the subject of these representations in his decision, because he held them, under his views of the law, immaterial.

Sixth. In 1874, defendant remodeled the interior of his dwellings, south of plaintiff, connecting them with the one on Forty-fourth street, and has since used them as a hotel. "These alterations did not, however, change the external appearance of the buildings." It did not appear that any objection to these was made by plaintiff.

In 1877, defendant intended and commenced to erect on his said two dwellings two additional stories for the same business. "In making such addition, the defendant intended to place the north side of said addition upon the party-wall, and for that purpose to use the whole length and width. * * * "The said two stories would be inappropriate from their height, but not otherwise, to first-class private residences."

"The market value of plaintiff's house would be diminished and its desirability as a first-class private residence lessened, by its proximity to the defendant's houses when enlarged and devoted to the business of a hotel."

Seventh. Plaintiff "has not, in fact, licensed, consented or agreed to the defendant's additions to his two houses, nor the contemplated use thereof, as enlarged, nor to the use or occupation of the party-wall for the purposes intended." Such changes were not contemplated by defendant, or anticipated at the time of the deed to plaintiff.

The answer admits the eighth paragraph of the complaint, which charges that defendant threatens and intends, in making the additions to his buildings, "to use the whole length and width thereof," &c. The court so finds. By its refusal to find the first ruling of law proposed by plaintiff, and by its decision, the court affirms the legal proposition, that, although plaintiff owns in severalty to the center of the party-wall, defendant has the legal right to occupy the whole of it with the two additional stories, plaintiff never having "licensed, assented or agreed" to such uses.

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Aside from the exceptions appearing upon the record, the case seems to present three elementary questions.

First. Whether defendant, against the protest of plaintiff, can increase the height of the party-wall in the manner threatened.

Second. Whether the verbal representations of defendant concerning the future use of his dwellings, cotemporaneous with the deed to plaintiff, create an *estoppel in pais* against his intended occupation of the two additional stories as a family hotel.

Third. Whether the covenants running with his title forbid the threatened erections and their use as proposed.

W. A. Beach, for plaintiff, appellant.

I. The maxim "he who owns the soil, has it even to the sky, and to the lowest depths," affirms the title of the plaintiff to the space above the party-wall in question north of its center. (*Auburn Road* agt. *Douglass*, 9 N. Y., 446). The proposition is not disputed. It is a necessary corollary that neither of the proprietors of a party-wall, standing upon the soil of each, has power to increase its dimensions so as to encroach upon the title of the other, without license. *First.* It would seem that this proposition ought to be accepted as a postulate. By the agreement for a party-wall, whether express, or implied from its erection, the respective owners acquire an easement in the land of each other. The extent of it must necessarily be defined in some manner. It cannot be unstable and mutable in accommodation of the caprice, or wants of one, against the will of the other. The absolute right of property cannot be unstable and shifting, nor can it be compulsorily invaded. This plaintiff cannot be constitutionally deprived of hers, but by her own volition, or due process of law. It cannot be denied that an erection placed upon the entire surface of the party-wall against plaintiff's protest would be an invasion of her property. The right to do so is claimed under the easement springing from its existence.

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No express agreement in regard to it is pretended. The position is, that the party-wall existing, either owner may enlarge it indefinitely upon the land of the other, without consent. From whence the right thus to appropriate plaintiff's property is derived, is not apparent. She must have licensed it in some form — either expressly or by implication, or it must follow that the mere erection of a party-wall implies a license, expanding with the wants and wishes of either proprietor. It is supposed that the case of *Brooks agt. Curtis* (50 *N. Y.*, 639), sustains this theory. The distinctions between *Brooks agt. Curtis*, and the present case are obvious and radical. 1st. Here, the party-wall was finished and perfect at the time of the conveyance to plaintiff. Its dimensions and character were thereby definitely established by the concurrence of the parties. The then condition of the party-wall, in the absence of all qualifying circumstances, was a practical definition of the easement. 2d. It was not situated in a business region, or designed for business use, but was intended for and devoted to the use of private dwellings. They were of a character rejecting any intendment of contemplated change. 3d. If any such intention could be otherwise imputed, it is conclusively rejected both by the positive oaths of the plaintiff and her husband, by the assurances of the defendant at the time of the grant to plaintiff, and by the finding of the court below.

Second. The doctrine of *Brooks agt. Curtis* must, therefore, be considered as referring the rights and powers of parties over a party-wall to their intention in its creation as expressed or implied from circumstances. No one will be likely to affirm that building a party-wall by adjoining proprietors confers the right, *per se*, upon either to enlarge it at pleasure upon the premises of the other. It is a burden upon the land. It must be lawfully there by grant or prescription or user. The conceded rule of *Brooks agt. Curtis*, by which rights in reality are conveyed by implied intention, is sufficiently vague and shadowy. It goes far beyond the recognized doctrine of

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implied grant, which applies only to established conditions. *Brooks* agt. *Curtis* substantially creates by intention a future easement. The intention cannot be found in this case. On the contrary, it is repudiated by every appropriate consideration and by the finding of the court. It was error, therefore, to consider the rights of these parties, decisively adjudged by *Brooks* agt. *Curtis*.

Third. It is a familiar rule that parties to a grant "are presumed to contract in reference to the condition of the property at the time of the sale." *Lampman* agt. *Wilks* (21 *N. Y.*, 505, 507) applied here—it follows, as declared by the same authority, that defendant had no right "by altering arrangements then openly existing, to change materially the relative value" of the property conveyed by him to plaintiff.

Fourth. In *Outhank* agt. *Lake Shore and Michigan Southern Railroad* (71 *N. Y.*, 194) the court of appeals announce several rules applicable to this case. There the plaintiff granted to the railroad company the right to lay pipes over his land to conduct water from a contemplated reservoir on the land of a third party. The right granted was subsequently located by laying the pipe. The court held that the grantee had no right to enter upon the land to lay down a larger pipe. The principle of the case is applicable when the easement is existing in perfect condition at the time of the grant. If an indefinite and unlimited easement becomes fixed and unalterable by location and acquiescence, it must be unchangeable where it is perfect when granted; unless, according to *Brooks* agt. *Curtis*, there is something in its condition or locality, or the purpose to which it is appropriated to indicate the intention of the parties that it may be extended. In its opinion the court adopt this expression in *Jennison* agt. *Walker* (11 *Gray*, 423): "This rule rests on the principle that where the terms of a grant are general or indefinite so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant giving a practical construction to it shall be deemed to be a just exposition of the intent of the parties."

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So, likewise, a practical construction, expressive of the intent of the parties, is found in the act of granting and accepting land on which an easement exists complete, and perfectly adapted to its designed use (*See Marion agt. Johnston*, 23 *Louisiana*, 597).

II. The proven representations and promises of the defendant, through which he induced the plaintiff to purchase, constitute a perfect estoppel against his threatened acts to plaintiff's injury. He represented and promised that his two dwellings should be occupied only as private residences. Plaintiff relied upon these and would not have purchased otherwise. Defendant threatens to violate them to her injury. He concedes that he intends to alter his buildings in structure and appearance, destroying their character as private residences. He admits his purpose to apply them to a use detracting from the privacy and convenience of plaintiff's premises. That the establishment he contemplates would be a serious annoyance is most manifest, not only from the undenied charges of the complaint, but from the known nature and incidents of the business. Every one knows that a public hotel, with its inevitable incidents of unceasing tumult and offensive vapors, and noisy publicity, is destructive of the comfort and privacy of a house, such as plaintiff's was designed to be, and as defendant promised his should be. The court so finds. These are the essential elements of an *estoppel in pais* (*Welland Canal agt. Hathaway*, 8 *Wend.*, 480; *Continental Bk. agt. Bk. Commonwealth*, 50 *N. Y.*, 575, 581; *Dezell agt. Odell*, 3 *Hill*, 215). The estoppel operates in two directions. It prohibits any substantial alteration of the party-wall, by which the character of the buildings as "first-class private residences" would be essentially changed, and it forbids their occupation for any other use injuriously to plaintiff. It may be, so far as the estoppel is concerned, that defendant might alter the internal arrangement of his dwellings and multiply his household with boarders, if plaintiff sustain no essential injury. Their exterior would be unchanged. Their appearance would

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still be uniform with plaintiff's and that of choice private residences. No injury to plaintiff would necessarily follow. But the proposed additions threaten radical change in the character of the property, to the obvious injury of plaintiff, and are a wanton breach of good faith and defendant's promises. She might endure measurable discomfort in preference to disagreeable litigation; but her patience is no apology for continuous and dishonorable exaction. The circumstance that plaintiff did not actively resist the interior alterations made in defendant's dwellings in 1874, 1875, has been embodied in the decision of the court below. Its pertinency is not perceived. It is not supposed that by the finding it was intended to intimate, either that plaintiff was thereby estopped nor that defendant did not promise. The last is found by the court and the first is decided otherwise (*Lottimer* agt. *Livermore*, 6 *Daly*, 501; *modified by court of appeals*, 72 *N. Y.*, 174). Plaintiff is probably concluded from objecting to the changes in the interior arrangement and use of defendant's dwellings prior to this action, but her acquiescence does not conclude her from resisting other and more offensive encroachments on her property right.

III. It is urged, and the court below so concluded, that these statements of defendant inducing the acceptance of his grant, cannot be deemed an equitable estoppel, because they are not expressed in the conveyance and are promissory in character. *First*. It may be granted that an easement, affirmative or negative, cannot be created by parol, although in *The Trustees of Columbia College* agt. *Lynch* (70 *N. Y.*, 440), the court of appeals are understood to have held, that a parol agreement for an easement may be enforced in equity. But conceding otherwise, and that the consequence of plaintiff's contention should be that she would acquire a negative easement, if successful the rule would not apply. She does not claim on the ground of grant, and need not on the ground of contract. She does not, principally, demand the enjoyment of an easement. Threatened with severe injury to her prop-

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erty she appeals to equity to restrain defendant from committing it, because, in good faith, he ought not to do it. His engagement was that he would not. Plaintiff trusted to his promises, invested nearly \$200,000 upon the faith of it, and will be grievously damaged if defendant is permitted to violate it. Holding him to the redemption of his pledged faith, in protection of rights acquired from him in reliance upon it, is no transgression of the doctrine that an easement must be created by deed. The two principles are distinct and independent. They rest upon different sources, springing from different considerations. The one is a doctrine of law, the other a rule of equity. The one regulates legal right, the other moral duty. Equity interposes where the law fails to enforce justice and good faith. It is absurd to say, that because the law declares an easement cannot be created by parol, therefore a grantor may deceive and mislead and wrong a purchaser from him with impunity. Just now the argument does not involve the inquiry whether the representation is promissory, because if the law rule controls it applies equally, whether the falsehood relates to future conduct or existing fact. Plaintiff insists that an equitable estoppel may be founded upon a verbal promise (other constituents being shown), whether it relates to an easement or any other right in realty, or to a matter transferable by parol. The only ingredients are statements — however made — reliance, threatened violation in bad faith, and resulting injury to the party deceived. *Second.* Numerous examples of estoppel by parol illustrate and sustain plaintiff's position. It does not require even words to create it. It may arise from acts, or silence and inaction. The right to flow the land of another (being an affirmative easement) may be gained by use short of twenty years, with knowledge of the owner without objection, on the ground of estoppel (*Brown agt. Brown*, 30 *N. Y.*, 519, 541). The real owner of land is estopped from asserting his title by silently allowing another to purchase it from a third person (*Town agt. Needham*, 3 *Paige*, 545; *Cheny agt. Arnold*, 18

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Barb., 436). Parol agreements, establishing an erroneous line between adjoining owners of realty, acted upon and improvements made, estop from insisting upon the true boundary. It does not operate as a transfer, but by way of estoppel (*Vosburgh* agt. *Teator*, 32 *N. Y.*, 561; *Corkhill* agt. *Landers*, 44 *Barb.*, 418; 16 *Hun*, 50). It would be a remarkable discrimination if title to realty could be acquired through an equitable estoppel, and an easement could not be. *Talmage* agt. *East River Bank* (26 *N. Y.*, 105), would seem to be decisive of the point. *Greenwalt* agt. *Myers* (85 *Penn. St. R.*, 369), recently decided in the highest court of Pennsylvania, SHARSWOOD, J., delivering the opinion, is instructive. The syllabus is thus given: "Parol evidence is admissible to show that a written contract was executed on the faith of a stipulation, condition or parol promise, made at the time of such execution, although it may vary and materially change the terms of the written contract." The case shows parol representations entirely promissory, connected with the sale of land. *Keates* agt. *Lyon* (*L. R.*, 4 *Chy. Appeal Cases*, 218, 222, 223), supports this reasoning (*See, also Pierce* agt. *Woodward*, 6 *Pick.*, 206; *Morgan* agt. *Griffith*, *L. R.*, 6 *Exch.*, 70).

Third. Aside from all authorities applying the doctrine of estoppel *in pais* it is insisted that the established definition of the term proves its applicability to the facts in proof. It rests upon a fundamental principle of right and justice. This case invokes the principle. If no exact precedent could be found equity, nevertheless, would discover the wrong and apply an efficient remedy. "No man shall found a right upon his own wrong." No sound reason can be given why defendant should not be held to his representations and promises; that they were made is settled by the finding of the court; that they were in good faith relied upon by plaintiff is also found; that plaintiff will suffer severely if defendant be permitted to act dishonestly is likewise certified by the court. Why should he be allowed to commit a wrong act to plaintiff's injury? He offers no excuse of mistake or surprise or change of circum-

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stance palliating his iniquity. He is a bold wrong doer. He denies what the court was forced to find as true, and rests his wrong upon technical legal rule. Plaintiff insists that rigorous law condemns him; but he is in equity before a court of conscience which binds him to honesty and good faith. No rule of public policy withholds the application to him of equitable doctrine. Multiplied precedents sanction it. Justice imperatively requires it. His false denial being exposed; his rash and reckless pursuit of his own interest, to the sacrifice of plaintiff's property and his own honor, demonstrating his want of principle and faith appearing, why should equity shield him with the gauze of technicality (2 *Parsons on Cont.*, 793 [6th ed.]; cases cited under point II; *Payne* agt. *Burnham*, 62 *N. Y.*, 69, 73; *Continental Bk.* agt. *Bk. Commonwealth*, 50 *id.*, 581, 582)? In *Life Insurance Co.* agt. *Mowry* (6 *Otto*, 544) justice FIELD, delivering the opinion of the court, says: "The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, has designedly induced another to change his conduct, or alter his condition in reliance upon them, could be permitted to deny the truth of his statements or enforce his rights against his declared intention of abandonment."

Fourth. The authorities cited above effectually answer the point made by counsel below that the promise of defendant was contradictory to the contract and deed, and merged in them. Defendant's representations do not conflict with any written instrument. They were entirely collateral to his deed to plaintiff, and would have been out of place in it. They were not a burden upon the land it conveyed. They were personal to the plaintiff, addressed to her as inducements to purchase. Whether or not they created a negative easement need not be discussed. At all events, they were not pertinent to anything in the deed, and were neither contradictory of or

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merged in it (*Farley* agt. *Farrell*, 51 *How.*, 49; *Potter* agt. *Hopkins*, 25 *Wend.*, 417; *Batterman* agt. *Pierce*, 3 *Hill*, 171; *Remington* agt. *Palmer*, 62 *N. Y.*, 31). *Fifth.* The court below relied upon *White* agt. *Ashton* (51 *N. Y.*, 280), as maintained "that the doctrine of equitable estoppel does not apply to a promise to be fulfilled in the future." If so it cannot be reconciled with *Talmage* agt. *The East River Bank* (26 *N. Y.*, 105), nor with *The Trustees of Columbia College* agt. *Lynch* (70 *N. Y.*, 440). Indeed, it stands in conflict, in text or in principle with all the authorities above cited on the question. There is, however, no such conflict. The question of equitable estoppel did not legitimately arise in *White* agt. *Ashton*. *Sixth.* It was hastily suggested below that the statute relative to conveyances of land forbidding the creation of estates or interests in land "except by deed or written instrument," was an answer to plaintiff's argument. The suggestion overlooked the concluding paragraph of the statute permitting their creation "by act or operation of law." The term "act of law" is defined to be "those events which occur in consequence of some principle of law." An equitable estoppel is within the definition.

IV. The covenants contained in the grants, through which defendant deduces title, prohibit both the alterations in his buildings he admits his intention to make, and the use to which he confesses his purpose to apply them. So far as useful here, they are against erecting or carrying on upon the premises any "tenement-house," "steam-engine," "business or calling noxious or offensive to the neighboring inhabitants." The deed to defendant is expressly subject to these covenants. *First.* Had there been no reference in the deed under which plaintiff claims title to the covenants in precedent conveyances, they would operate upon him, and plaintiff, although her grant is silent, could claim their benefit (*Trustees, &c.*, agt. *White*, 4 *Paige*, 510; *Barrow* agt. *Richard*, 8 *id.*, 351; *Phoenix Co.* agt. *Continental Co.*, 14 *Abbt.* [*N. S.*], 266; *Gilbert* agt. *Peteler*, 38 *N. Y.*, 165; *Atlantic Co.* agt. *Libby*, 45 *id.*, 499;

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The Same agt. *Leavite*, 54 *id.*, 35, 444; *Clark* agt. *New York Life Co.*, 64 *N. Y.*, 33; *Brown* agt. *McKee*, 57 *id.*, 684). *Second.* The buildings of defendant with the additions and changes he threatens and has made, would form a "tenement-house" within the sense of the covenant. *Third.* Any hesitation concerning the character of defendant's proposed establishment is avoided by the concluding clause of the covenant interdicting any "business or calling noxious or offensive to the neighboring inhabitants." That it will be offensive is substantially admitted. As matter of common knowledge it will be so. The court in effect finds it. This branch of the covenant, without aid from other members, condemns defendant's threatened addition, and entitles plaintiff to the relief demanded (*See justice WESTBROOK's opinion*, 53 *How.* 311). *Fourth.* The doctrine of merger advanced by defendant has no application. The case cited of *Keates* agt. *Lyon* (*L. R.*, 4 *Ch. App. Cases*), is not parallel. There the original grantor, in whose favor the restrictive covenants ran, subsequently became the owner of all the property to which they applied. He afterwards conveyed, and it was made a question of fact whether he intended to perpetuate the covenants. Here, defendant did not create the restrictions. He bought subject to them and cannot remit them. He did not become the owner of all the land upon which they operated, and cannot therefore extinguish them. But the point is decisively answered by the force of his representations and promises. These evinced an intention to continue the covenants. As to the plaintiff, at least, he cannot deny their existence.

V. The jurisdiction of equity in a case like the present was denied in the court below. The cases cited under point IV, sub. *First*, affirm the jurisdiction of equity in cases like the present. *Trustees of Columbia College* agt. *Lynch* (7 *J. & S.*, 372), is reversed in the court of appeals (70 *N. Y.*, 440), by a recent decision unreported, the court affirming the appropriateness of the remedy by injunction. Justice STORY maintains

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the same doctrine (2 *Story's Eq.*, secs. 925, 926, 927, &c.). It is not deemed necessary further to discuss this proposition.

VI. It is not needful to review the English authorities relating to party-walls. They are mostly inappropriate, inasmuch as they treat the proprietors as tenants in common. With us the title is in severalty (*Nast agt. Kemp*, 49 *How.*, 522, *affirmed at general term*; *Partridge agt. Gilbert*, 15 *N. Y.*, 601, *SHANKLAND's opinion*; *Hendricks agt. Starks*, 37 *id.*, 109; *Sherred agt. Cisco*, 4 *Sand.*, 480; *Brown agt. Pentz*, 1 *How. Ap. Ca.*, 227, *McCOUN's opinion*, p. 231; *Brooks agt. Curtis*, 50 *N. Y.*, 639-642). It may not be useless to subjoin brief references to the English cases (*Matts agt. Hawkins*, 5 *Taunton*, 20 *S. C.*, *En. Com. L.*, 4). One owner raised the party-wall; the other pulled it down. Court held, latter was liable in trespass for injury to the part standing on the former's land. By implication the case holds defendant was not liable for removing the portion on his own side. And that is a denial of the right of either to build over his line (*Cubbitt agt. Porter*, 8 *Barn. & Cress.*, 257; *S. C.*, 15 *Com. L.*, 211). In this case the party-wall was pulled down and built higher. Court held, trespass would not lie, but BAYLEY, J., said if the wall was built higher than it ought to have been, the injured party might remove it. The case was decided upon the technical rule that a tenant in common could not maintain trespass against his co-tenant. But the implication from it is that it was wrongful to increase the height, otherwise its removal would have been tortious. *Stedman agt. Smith* (8 *Ellis & Blackburn*, 1; *S. C.*, 92 *Com. L.*, 1) is a strong authority, and seems to have escaped observation. Defendant's stable roof rested on the whole width of a party-wall. He took down stable, removed coping stones from top of wall, raised it higher, replaced coping stones and erected a wash-house, resting the roof on the whole width of wall. On the trial the jury found the wall belonged in common to the parties. Whereupon verdict was directed for defendant on the ground that no ouster had been shown.

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New trial granted, the court holding that there was enough to go to the jury on the question of ouster. The opinions show that any substantial change in the wall, depriving one of any use to which he was entitled, gave a right of action even as between tenants in common.

A. J. Vanderpoel and *H. B. Turner*, for defendant, respondent.

I. The defendant cannot be enjoined from improving his property as proposed by him in consequence of any promise made by him to the plaintiff, or any conversations had by him with the plaintiff on the subject. In *Clark agt. New York Life Ins. Co.* (64 *N. Y.*, 33), at page 40, he says: "It is sought seriously to interfere with the right of property in that lot, and to justify such interference requires something more than a doubtful right. If the true construction of the contract is doubtful, as perhaps it should be regarded, the plaintiff must fail. A reasonably clear case should be made before the rights of an owner of property should be impaired to the extent claimed." It is not to be supposed that either party, when conversing in anticipation of a bargain which was to be reduced to writing, supposed he was creating a permanent incumbrance on his lot or limitation or hindrance to its appropriation to other uses, if the changing necessities of the city require it (*Hieatt agt. Morris*, 10 *Ohio State Rep.* 530). The allegations of the complaint in this regard would constitute no ground for the relief demanded, even if they had been proved. (a.) If any such promise, &c., was made, it was merged in the written contract between the parties, the deed to which they were preliminary, which is the only evidence of a final agreement between the parties. Any other rule would obviate the necessity of inserting covenants in a deed (*Schermerhorn agt. Vanderheyden*, 1 *Johnson*, 139; *Drew agt. Swift*, 47 *N. Y.*, 208, 209; *Renard agt. Garrison*, 12 *N. Y.*, 561; *White agt. Ashton*, 51 *N. Y.*, 280). (b.) Any such agreement not being contained in the deed, but being confessedly

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parol, is void under the statute. "No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing" (2 R. S., 134, sec. 6). "A contract void by statute, is void for all purposes. It confers no right and creates no obligation as between the parties to it, * * * it cannot be enforced directly or indirectly. The plain intent of the statute is that no person shall be subjected to any liability upon an agreement. * * * There is no contract from the violation of which damages in a legal sense can arise where the agreement proved is within the statute" (*Dung agt. Parker*, 52 N. Y., 494). (c.) The alleged agreement, if made, was part of the contract of purchase or a separate contract. If the former, the deed is the sole evidence of it, or it is void under the statute; but if it is a separate contract it is void for want of consideration. The provisions of the contract not required to be in writing cannot be separated from those which must be in writing, so as to support an action, unless there be a separate and distinct consideration. "While both rest upon the same consideration the provisions are inseparable and void" (*Dow agt. Way*, 64 Barb., 259; *Farley agt. Farley*, 51 Howard Pr., 479). The plaintiff claims nothing less than an easement in the defendant's land. A negative easement or servitude is defined to be "where the owner of the servient estate is prohibited from doing something otherwise lawful on his estate because it will affect the dominant estate" (*Washburn on Easements*, 301, sec. 5, book 2, marg. 26; *Columbia College agt. Lynch*, 70 N. Y., 440). Now an easement can be created only by grant or prescription.

An easement by grant requires a deed; it cannot be created by parol (*Washburn on Easements*, 303, marg. 28; *Mumford*

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agt. *Whitney*, 15 *Wend.*, 380). Indeed it is not strictly correct to say that an easement can be created by prescription. A title by prescription implies a lost grant, and after lapse of a long time a grant is conclusively presumed. It is a matter of evidence only. An easement may be implied in a grant, but it depends upon the grant and cannot be created by parol. These are fundamental principles, and unless they are disregarded the plaintiff's claim cannot be sustained. Nor can the plaintiff be aided upon the theory of an estoppel in *paris*. An estoppel in *paris* can only be founded upon an assent to, or admission of, some fact or the doing of some act. A promise to act is insufficient, and the doctrine cannot be invoked to subvert the principle that prior or contemporaneous agreements are absorbed in a written contract" (*White* agt. *Ashton*, 51 *N. Y.*, 280; *Springsteen* agt. *Powers*, 3 *Robertson*, 483; *Shapley* agt. *Abbott*, 42 *N. Y.*, 443).

But the plaintiff's counsel contends that the rule expressed in the head note of *White* agt. *Ashton* is only the language of the reporter and not warranted by the case. It will be found, however, that such is not the fact. It is surprising to us that at this day a contrary doctrine can be contended for. The opinion of judge HUNT is clear and distinct, but to obviate all questions we cite the following cases: *Langdon* agt. *Doud* (10 *Allen*, 433), *Brightman* agt. *Hicks* (108 *Mass.*, 246), *Shapley* agt. *Abbott* (42 *N. Y.*, 457).

No case can be found in which the courts have sustained negative easements created by parol, in which the grand element of mutuality was lacking.

The defendant quotes *Tallmadge* agt. *East River Bank* (26 *N. Y.*, 105). The facts of this case are more fully stated under the head of *Maxwell* agt. *East River Bank* (in 3 *Bosworth*, 124), which is the same case. The views of judge BOSWORTH in affirming the judgment of the special term, were affirmed by the court of appeals.

Again, in the case of *Columbia College* agt. *Lynch* (70 *N. Y.*, 440), it is very clearly shown that such cases turn on the

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mutuality of the agreements of the parties as to their property, and the mutual execution. Judge ALLEN refers to the subject as "reciprocal easements."

II. The action of the defendant in no wise violates the covenant against nuisances contained in the deed of Cowdrey, referee, under which the defendant claims title.

1. As between the plaintiff and defendant the covenant was extinguished.

By the decree in the suit of *Fair* agt. *Ireland* in 1866, William L. Cowdrey was appointed referee to sell a large number of lots, including the land on which the houses of both plaintiff and defendant stand. The deeds were made to the several purchasers, subject to the covenant above recited, the various purchasers covenanting with each other and with their grantor. In time the defendant acquired under these deeds a plot of land at the corner of Fifth avenue and Forty-fourth street, being the lands now owned by the plaintiff and by the defendant. Manifestly the right that the grantees of these particular lots from the referee had to enforce this covenant, as against each other, was gone by the union of the title in one person (*See Keates* agt. *Lyon*, *L. R.*, 4 *Chy. App.*, 218). Suppose the defendant had acquired all the lots covered by the judgment, and sold by the referee's deed, and had conveyed half of them by deed, without the covenant, to other persons, it would hardly be claimed that the covenant revived, and that the grantees had a right to enforce against their grantor a covenant which he could not enforce against them. It would be clear that having acquired the entire land, and having conveyed part by deeds, without the covenant, his intention was that the land should be free from any restrictive covenants. In precisely the same way it is clear that the defendant intended, when he conveyed to the plaintiff by full covenant deed, without the covenant in question, that the lots which he had acquired should be, as between themselves, free from the operation of the restrictive covenant. Of course, the rights of the owners of the other lots conveyed by the referee to

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enforce the covenants against both plaintiff and defendant are not now in question (*Parsons agt. Johnson, Ct. Com. Pleas, January, 1877, 4 Weekly Digest, 228*). 2. Even if this covenant existed between the parties there is nothing in the covenant itself authorizing the injunction sought for by the plaintiff. Such a covenant being in derogation of the estate must be strictly construed and will not be favored by the courts. Examples can be multiplied where covenants of this character have received the strictest construction so as to lessen as far as possible the restriction upon the free use of the servient lands. The following cases illustrate the principle: *Pease agt. Coats (L. R., 2 Eq., 688)*, *London & N. W. R. R. agt. Garnett (L. R., 9 Eq., 26)*, *Jones agt. Bone (L. R., 2 Eq., 674)*, *Haverstick agt. Sipe (33 Penn., 369, 371)*, *Turner agt. Evans (2 Ellis. & Bl., 518)*, *Schenck agt. Campbell (11 Abb. Pr., 292)*.

III. The defendant has not trespassed upon the rights of the plaintiff in any way by building upon the party-wall standing between his premises and those of the plaintiff.

1. The defendant has an unquestionable right to build on that portion of the party-wall which remained his own property after the sale of the adjoining house to the plaintiff.

Each of the parties is the owner of one-half of this wall in severalty, subject, however, to the easement of support of the other party therein (*Washburn, Easements, 454, 455; Sherred agt. Cisco, 4 Sandt., 480*).

2. Not only has the defendant the right to build upon his own half of the wall, but he has the still further right to increase the height of the entire wall, as an incident to the easement (*Brooks agt. Curtis, 50 N. Y., 639, 641; Watts agt. Hawkins, 5 Taunton, 20; Partridge agt. Gilbert, 15 N. Y., 601; Clark agt. N. Y. Ins. Co., 64 N. Y., 33*).

V. The findings of the court on the conclusions of fact and law embrace every question material to the issues in this action.

VI. There was no error in the court declining to adopt the

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statement of facts and conclusions of law proposed on the part of plaintiff.

VII. The judgment of the court below should be in all respects affirmed, with costs of appeal to the defendant.

BRADY, *J.* — The questions presented by this appeal have been the subject of elaborate investigation and of numerous consultations between myself and associate, justice BARRETT. We approached the consideration of them impressed with their importance and the results which might attend our conclusions. This deliberate and careful examination has led, however, to the conclusion that upon all of them except one, and those incidental to or necessarily connected with it, the conclusions arrived at in the special term were correct.

The learned justice who presided in the court below has expressed his views in an extended and able opinion, and we adopt them as a forcible exposition of the law in this case, with the single exception to which we shall presently refer. We do not consider it necessary, therefore, to make any further allusion to them, and proceed at once to the consideration of the question about which we think he has erred.

The evidence shows that, prior to the purchase of the premises by the plaintiff, there were interviews between her, her husband and the defendant in regard to them, in which certain statements and representations were made as to the character of the houses, of which her purchase was one, and their then present and future use. It appears from the findings of the learned judge that these representations were made, although denied by the defendant, and that they, in fact, influenced the plaintiff in purchasing the house bought by her.

The testimony of the plaintiff on this subject is as follows :

Q. At either of those conversations do you recollect any statements or declarations by Mr. Sherwood in regard to the occupation of his remaining buildings? A. Perfectly.

Q. And are you able to designate at which of the conversa-

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tions that occurred? A. No; I can't designate at which one, because before we had positively gone that far we had had a good many conversations; had looked through the house several times, I remember.

Q. Will you now state what those representations or statements of Mr. Sherwood, to which you allude, were? A. I remember perfectly, on one occasion — which conversation I can't remember — we were going through the lower rooms of the house; Mr. Sherwood had a cane in his hand, and he was constantly knocking the plate glass to show the superiority of the glass, and also to examine the woodwork of the house. We came to the rear room of the house; the outlook was not very pleasant, as one of the lots on the north side was not cultivated at all or built upon, and I said to Mr. Sherwood, "This does not look very prepossessing," and he said, "Well, there will be nothing upon it that will be disagreeable, because all the property around these buildings are under restrictions; nothing that is objectionable can be built; I myself am restricted from putting anything but first-class private residences on this property, and they will always be, first and last, private residences.

Q. What influence did that declaration of Mr. Sherwood, in regard to his buildings being always, first and last, private dwellings, have upon your proposed purchase? A. It had a great influence upon me. It was upon that that we bought, knowing that the two houses on Fifth avenue were all finished, and the one on Forty-fourth street nearly completed, which he told me would be his own private residence.

Q. Would you have made the purchase of this house without those statements and representations? A. No, sir; I should have seriously objected to it. I should not have bought.

And we regard the learned justice as having found this, because, in answer to the application of the defendant to make one finding involving this element, he says: "As a whole I decline to find this proposition;" but in reference to the con-

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tract of sale, says as follows : " In my decision, filed herewith, I have stated, as my conclusion upon the evidence, that on one occasion, in the earlier stages of the negotiations and anterior to the contract of the fifth of December, in an interview between the parties while inspecting the premises, the defendant, in response to a remark made by the plaintiff in regard to other property, made certain statements, which are stated in my decision, as well as the circumstances under which they were made. The statements were, however, in substance as those stated in this proposition. But I do not attach to them the character of formal representations or promises made to induce the purchase. No agreement of the parties was then reached. And in view of what afterwards transpired between the parties in coming to an agreement, and of the contents of the contract and deed, I do not regard these statements as material. The defendant and her husband have, however, both testified that they relied on those statements in making the purchase, and would not without them have made it. I accept their evidence as to the influence of these statements upon them, but I do not think the facts and circumstances justify such reliance, as I have stated my opinion."

It also appears that, at the time these representations were made, four houses on Fifth avenue, including the plaintiff's, were finished, and one in Forty-fourth street, forming a part of the defendant's plot of land, was nearly completed ; so that the representations were made as to existing things, to facts accomplished, namely, houses completed and one in process of erection and nearly completed, and all of which were necessarily of the character named, because, as the defendant said, he was restricted from erecting other than first-class private residences on the property.

The learned justice, while accepting the evidence of the plaintiff and her husband in reference to the representations referred to, did not deem the facts and circumstances embraced in them as sufficient to justify a reliance upon them, but regarded them as having no legal vitality, substantially for the

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reason that they were not incorporated in the deed or in the contract of sale, and were not repeated or alluded to at the time the contract of sale and purchase was made. It appears further that, after the representations were uttered, and while negotiations were pending, an offer was made by the defendant to accept \$120,000 for the house, which elicited an offer for it on the part of the plaintiff of \$110,000, and that offer being accepted, the defendant drew the contract, he and the plaintiff's husband uniting their efforts to accomplish that end, and the contract thus prepared by them was copied and executed, each one taking a counterpart.

It is true that no reference was made to the houses in the respect embraced in the representations made in the earlier negotiations for the purchase, and that nothing was said about them at the time the contract was prepared and executed, according to the testimony. They were neither repeated, nor withdrawn or modified, and therefore whatever impressions were formed were allowed to remain. But it appears from the evidence, and is regarded by us as having been substantially found by Mr. justice VAN VORST, that the representations and statements mentioned were the inducing cause of the purchase, one of which, as we have seen, and a very important one, was the restriction by which the defendant declared himself to be controlled as to the use of the land. The location of the property, the character of the houses as erected, and the price paid by the plaintiff for the one that she purchased, all have an important bearing not only upon the question whether or not the representations were made, but upon their influence in effecting the sale, and tend to fortify the charge that such representations were made and were an inducing cause.

It is evident from the testimony that the plaintiff was purchasing what she regarded as a first-class residence, in a desirable locality, the character of which was secured by restrictions to the extent stated, and her testimony is that it was bought as a private residence and as a permanent home. The infer-

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ence justly to be drawn from the facts — namely, the locality and character of the house and its surroundings and the consideration paid for it — was that the plaintiff was paying for the special privileges arising from the fact that it was, and the defendant's houses adjoining it were, by restrictions, stated to be private residences, in the language of the plaintiff "always, first and last," as declared to her by the defendant himself.

Assuming, as we must, from the views expressed by the learned judge, that the defendant made the representations stated by the plaintiff and her husband to have been made prior to the purchase, and that those representations were the inducing cause of the purchase, we do not understand why the defendant should not in equity, on the plaintiff's application, be restrained from altering the character of the houses which he thus declared, by restrictions in force, were to be and should be, first and last, private residences, unless she has waived her rights in this respect.

The circumstances under which the contract was prepared should not be regarded in equity otherwise than as favorable to the plaintiff, because neither of the parties framing the contract were lawyers, and they prepared it without resort to professional aid, which would probably have developed all the elements necessary for the protection of the plaintiff in reference to the representations made. The defendant in making these representations, which are in their nature promises to some extent, may have gone further in the negotiations than he designed in his zeal to sell his property. But we have nothing to do with that, inasmuch as the court below has determined the issue which we have suggested on that subject in favor of the plaintiff.

These representations having been made and the property having been purchased through the influence which they exercised upon the plaintiff, the defendant has created an obligation which imposes upon him the observance of his representations and promises, relating, as they do, not merely to acts in the future, but as already suggested to an existing

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state of facts — namely, the construction of houses completed — which in their character, by avowed existing restrictions, were and was to continue to be private residences, and this embraced the use of the easement connected with them. We regard this case, therefore, upon these elements, as one which is governed by the principles enunciated in the case of *Tall-made agt. East River Bank* (26 N. Y., 105). In that case it was held that the owner of land, as stated in the syllabus of the case, might by parol contract with the purchasers of successive parcels, in respect to the manner of its improvements and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice of the fact, though his legal title be absolute and unrestricted. It was said in that case by SUTHERLAND, J.: "From the facts found by the judge at special term, it appears that when the plaintiff, Maxwell and others, bought lots in St. Mark's place, of Davis, they were shown the map or plan of St. Mark's place, showing that the houses on both sides of the place were to be set back eight feet from the street, and that they bought on the assurance of Davis that that plan should be observed in building on the place; that the strips of eight feet in width on both sides of the street should not be built upon, but kept open. It is to be presumed that they would not have bought and paid their money except on this assurance. It is to be presumed that relying upon this assurance they paid a larger price for the lots than otherwise they would have paid." This case does not stand alone. In the case of *Meyers agt. Watson* (1 Simon [N. S.], 523), a case in which the plaintiffs insisted that they were not bound to do anything except what was imposed upon them by the written contract, it was held that a specific performance would not be enforced for the sale of land, even in a case where no actual fraud had been perpetrated to induce the making of the contract, but where the grantee was induced to enter into the contract in consequence of an independent

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engagement by which the vendor was to do something which he had failed to perform. The court said: "Was there any engagement on the part of Potter to do anything which he had failed to do, on the faith of which being done it is reasonable to believe that the defendants entered into the contract in question?" And further, "if the court is satisfied that such an engagement was made, and that on the faith of it defendant entered into the contract now sought to be enforced, if the plaintiff fail to do that which he has undertaken to do, even though it would have been an engagement incapable of being legally enforced, the court would leave the plaintiff to such redress as he would be entitled to at law." And further, "when, acting on the faith of representations made as to future acts to be done the parties have entered into a contract, it would not be consistent with the doctrines of equity to compel them to perform these contracts at the instance of those who failed to perform engagements which they entered into, and on the faith of which the contracts were made." And the concluding part of the opinion declares: "On the whole I am of opinion that it is satisfactorily made out that the vendor induced the defendant to enter into this contract on the assurance that certain things material to their interests should be done by him; and that having failed in performing what he had engaged to do, his assignees are not entitled to relief in this court, so that the bill must be dismissed, with costs."

In *Powers agt. Woodward* (6 *Pick.*, 206) it was held also that on the purchase of land parol evidence was admissible to show that the principal inducement to the plaintiff to purchase was a succession to the business which had been carried on in the premises by the grantor, and with which the latter undertook to interfere (*See, also, Grenawald agt. Meyer*, 35 *Penn.*, 369). It might well be presumed from the evidence that this plaintiff would not have bought the house which she purchased from the defendant and paid the consideration she gave for it, had it not been for the representations made in reference to

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the houses of which it was one, if it were necessary to provoke any such element; but it is not, because the fact is found that she was induced by them to make the purchase. It is to be presumed, also, that relying upon this assurance the plaintiff paid a larger sum for the property than she would otherwise have paid.

The learned justice, in commenting upon the case of *Tallmadge agt. The East River Bank (supra)*, observes, in his opinion in regard to it, that there is entirely absent from the plaintiff's claim what was a special feature in Tallmadge's case, namely, the reciprocal and mutual easement, and, further, that the plaintiff here was placed under no obligation to use her house as a private residence. If, however, the doctrine declared in the case just mentioned is to prevail, and we assume that it is, notice to her of the character of the defendant's houses, and the terms upon which they were sold, would be equally controlling upon her as upon Davis in the case (*supra*), and upon the subsequent purchasers as declared in that case. Indeed, it seems to be quite clear that if the plaintiff had attempted to appropriate her house to purposes inconsistent with the design of the defendant in constructing it and the other houses, she could be prevented, on her statement, by a just application of the rule of law now invoked for her benefit. It must not be forgotten, in the consideration of the question involved, however, that the plaintiff's house was built with an easement — a party-wall — and which, consequently, existed at the time of the negotiations for, and the sale of it to the plaintiff, and which was referred to in the conveyance to her. Therefore, as already suggested, it is the use of the existing easement for purposes antagonistical to the expressed design of the defendant in building the houses, made patent by his statements and representations, which is complained of, and by which the house adjoining the plaintiff's, to the prejudice of her property, as shown by the evidence, was enlarged, not as a private residence, but for business purposes, namely, as part of a family hotel. We do

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not wish to be understood, however, as declaring it to be our judgment that the defendant would have no right to build upon the party-wall, if the object were to enlarge his house as a private residence. We think the case of *Brooks agt. Curtis* (50 *N. Y.*, 639) is decisive of that question in his favor. Such a use might be in perfect harmony with the original design in the structure of the houses and the representation and restriction to which reference has been made. The enlargement of the houses adjoining the plaintiff's premises was not contemplated with any such intention or for any such purpose, according to the findings of the learned judge who presided at the trial, but, as already suggested, was for the purpose of affording accommodation for a larger number of guests in the hotel to which the defendant's houses adjoining had been appropriated.

We do not wish to be understood either as declaring that the defendant is under obligation to reform the character of the houses, other than the one adjoining the plaintiff, because we think that the changes which were made prior to the commencement of this action in the other houses must be regarded as having been assented to or acquiesced in by the plaintiff, because she allowed them to be thus changed without objection, and in equity must bear the consequences of the alterations so made.

Our judgment is, therefore, it appearing that plaintiff did not assent to the use of the party-wall between her and the adjoining premises for the erection of the additional stories which were made for business purposes, her right to protection from such a use by the defendant exists, and in equity and good conscience should be enforced; and that the learned judge at the special term erred in his conclusion of law upon that subject. This view renders the defendant liable to the consequences of his statements and representations discussed, which, as we have seen, induced the plaintiff to purchase.

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It follows, therefore, that there must be a new trial, which is ordered, with costs to abide the event.

BARRETT, J., concurs.

NOTE.— The question involved in the foregoing case seems to be a very close and interesting one, and has been closely and sharply contested. The case having gone back for a new trial, and there having been such a diversity of reasoning and comment upon the cases cited, we have given more space than is our custom to the arguments of counsel, believing that in doing so we were conferring a benefit upon the profession.—[REP.]

SUPREME COURT.

MARIA SNYDER agt. WILLIAM E. SNYDER and JOHN CASWELL.

Right of burial— Right to select the place of — Injunction.

The question as to the right to select the place of burial of deceased must be solved upon equitable grounds. While there is property in the burial lot, in the monuments, in the ornaments and decorations of the deceased or his grave, there is none in the remains themselves.

Since the common law cannot protect or bestow them as property or afford an adequate remedy in cases which sometimes occur, equity will be invoked to grant such protection and give such remedies as seem to be required by the circumstances, and are in consonance with the feelings of mankind.

The person having charge of the remains hold them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them; in case of a contention the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all the circumstances.

In a contention between the widow of the deceased (who was his second wife) and his only son and heir (being the child of his first marriage), as to the disposition of his remains after taking into consideration all the circumstances:

Held, that the claim of the son was to be preferred.

Schenectady Special Term, September, 1880.

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MOTION to dissolve injunction.

David Snyder died August 2, 1880, in the asylum for the insane in Utica, of which he was then an inmate. The defendant, William E. Snyder, is his only son and heir, being the child of his first marriage. The deceased formerly resided in Glastonbury, Connecticut, was married there in 1840, and continued to reside there until 1869. While there three children were born to him, two of whom and his first wife, their mother, died and were buried in a lot which he purchased in the cemetery there. In 1876 the said David married the plaintiff, who was then residing with her father in the town of Florida, Montgomery county, where she has since and still resides. David lived with her at her father's for about two years, when, having been adjudged a lunatic, a committee was appointed of his person and estate, and he was removed to the asylum. There is no issue of the second marriage. His son was present at the time of his death, took charge of the remains; the funeral services, by consent of both the widow and son, were held at the home of the widow, she being confined there by illness. The widow desired the remains to be buried in a lot owned by her father in the cemetery in the village of Amsterdam; the son desired to have them conveyed to Glastonbury and buried in the lot of the deceased by the side of his first wife and deceased children. Two sisters of the deceased united with the son in his request. The son and his codefendant, a brother-in-law of the deceased, were by means of superior force about to place the remains upon a railroad car for the purpose of transportation to Glastonbury, when they were stayed by the injunction which this motion seeks to dissolve. The deceased left no will.

W. L. Vandenburg, for plaintiff.

P. J. Lewis, for defendants.

LONDON, *J.* — It is asserted in many cases, following the Roman law, that the exclusive right of burial and the right to

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select the place of burial rests, in the absence of any testamentary direction on the part of the deceased, in the next of kin (4 *Bradf. Sur. R.*, 532; 3 *Edw. Ch.*, 152; *Coppers' case*, 58 *How. Pr.*, 55; *Tyler's Ecc. Law*, sec. 971; *Rosseau* agt. *City of Troy*, 49 *How. Pr.* 492; *Wyncoop* agt. *Wyncoop*, 42 *Penn.*, 293). For curious and interesting discussions and notes to cases upon the subject, see also notes to *Moak's Eng. Rep.* (vol. 12, p. 656), *Pierce* agt. *Proprietors of Swan Point Cemetery* (10 *R. I.*, 227). Most of the cases there referred to arose with respect to the right to protect the place where the remains were buried, to prevent a disinterment or to collect from the executors, husband or relative of the deceased the expenses of the funeral. In the absence of a contention prior to burial, as to the right between relatives to designate the place of burial, the broad doctrine that the right rests exclusively with the next of kin can hardly be considered as a judicial exclusion of the right of the widow. The words "next of kin," used *simpliciter*, without anything in the context to indicate a different meaning, mean those of the kindred or blood, excluding the widow (*Slosson* agt. *Lynch*, 43 *Barb.*, 147). It is otherwise as to statutes in which the intent is plain that the widow is included (*Merchants' Ins. Co.* agt. *Hinman*, 32 *Barb.*, 410; *Green* agt. *Hudson R. R. Co.*, 32 *Barb.*, 25). In the *Secor* case (10 *Albany Law Journal*, 70), after the burial of the deceased by the widow, with the consent of the son, the latter was enjoined from removing the remains for the purpose of interment in a lot of his own. It is true that in the case it was remarked that the wife's right of burial was better than the son's, but that was not the point involved, and the case was well disposed of on the ground that the son did not, at the time of burial, dissent. In *Pierce* agt. *Proprietors, &c.* (10 *R. I.*, 227), the widow, after burial, was required at the suit of the son to restore the remains of her husband to the burial lot in which they had been interred upon his death, with her consent and the consent of his children, and from which she had removed

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them without their consent for the purpose of interment elsewhere.

In *Wyncoop agt. Wyncoop* (42 Penn., 293), the widow was denied the right to remove the remains of her deceased husband from the cemetery in which his relatives had interred them, and this under circumstances of peculiar urgency in her favor. The courts will intervene to protect the grave where the remains lie, but are slow to permit, against the objection of the relatives, a removal after they are once buried (*See Moak's note, supra*).

It is believed that this question must be solved upon equitable grounds. While there is property in the burial lot, in the monuments, in the ornaments and decorations of the deceased or his grave, there is none in the remains themselves. Since the common law cannot protect or bestow them as property, or afford an adequate remedy in cases which sometimes occur, equity has been invoked to grant such protection and give such remedies as seem to be required by the circumstances, and are in consonance with the feelings of mankind, and equity has assumed jurisdiction (*Kurtz agt. Beattie*, 2 Peters, 566, 584; *Trustees agt. Walsh*, 57 Ill., 363; *Pierce agt. Proprietors, &c.*; *Wyncoop agt. Wyncoop*; *Rosseau agt. City of Troy*; *Secor's case*, above cited, see 4 Alb. Law Jour., 56; 17 *ib.*, 258). In the case of *Pierce agt. Proprietors, &c.*, it was said that the person having charge of the remains held them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them; that in case of a contention, the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all the circumstances. I entirely concur in this view.

To lay down the inflexible rule that the widow is to be preferred to the children, might, rare as such contentions are, sometimes result in great harshness and outrage. Adopting this rule, I award the disposition of these remains to the son,

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to the end that they may be buried in the lot purchased by the deceased in his lifetime, near the place of his early residence, where his first wife, and two children by her, lie buried. He had no children by his last wife; the lot in which she proposes to bury him is her father's. It cannot now be known whether she will find her grave in the same lot and not by the side of another husband. It seems to be more in consonance with what we may presume his feelings in his rational moments to have been, to bury him by the side of his children and their mother, rather than alone in the lot of a stranger, and certainly more in consonance with the feelings of those who are bound closest to him by the ties of blood and longest affection. I mean to recognize the fact that circumstances may exist which should give the widow the preference over the son, but in this case I think the claim of the son is to be preferred.

The motion is granted.

SUPREME COURT.

THE PEOPLE *ex rel.* THOMAS GILMORE agt. JOHN CALLAHAN,
justice, etc.

Summary proceedings — District court justice no jurisdiction to remove tenant where premises are not within his district — tenant must appear and object.

In landlord and tenant proceedings, in the district courts, though the boundaries of the several judicial districts are within the supposed judicial knowledge of the courts, the locality of the streets and avenues and their termini, and the number of houses situated thereon, are not matters of judicial notice; and unless the tenant appears and objects, the proceedings of the justice are not void for want of jurisdiction, though the premises from which such tenant was removed be not within the justice's district.

First Department, General Term, February, 1881.

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CERTIORARI to review summary proceedings under the landlord and tenant act.

M. J. Kelly, for relator.

Daniel Seymour, for respondent.

DAVIS, *P. J.*—The only question in this case is one of jurisdiction. It was lately held by this court, in *The People ex rel. Hambrecht* agt. *Campbell* (60 *How.*, 102), that a justice of a district court of this city has no jurisdiction in summary proceedings to dispossess tenants under the landlord and tenant act, unless the premises are situated within his district. The only question left in this case is, whether the court can take judicial cognizance that the premises from which the relator was removed (No. 689 First avenue, in the city of New York), are not in the first judicial district of said city. The several wards of the city are civil divisions of which courts are to take judicial notice as of the several towns of the state (*The People* agt. *Price*, 9 *Cow.*, 429; *Chapman* agt. *Miller*, 6 *Hill*, 475; *Munson* agt. *Gleason*, 7 *Barb.*, 472). The judicial districts are also civil divisions created by statute, the boundaries of which are within the supposed judicial knowledge of the courts. The first judicial district comprises the first, second, third and fifth wards of the city of New York (*Laws of 1857, chap. 344*), and those wards comprise the territory south of a line drawn from the Hudson river, through Canal street, Broadway, Park row, Spruce, Gold and Ferry streets, and Peck slip to the East river (*Davies' Laws of New York*, 261). There is nothing in the return of the justice, to which alone we are to look for the facts, to show that the First avenue is not within the first judicial district. It is, of course, within the personal knowledge of the several justices of this court that it is not so situated; but streets and avenues are not civil divisions created by statute, and their locality, termini, and the numbers of the houses situated

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thereon, are not matters of judicial notice. It was the business of the relator to have shown distinctly the fact that the premises from which he was removed are not within the justice's jurisdiction. In the absence of that fact, in proceedings like this, the maxim of the law, which presumes all official acts to be rightfully done until the contrary appears, must intervene to uphold judicial proceedings, even in inferior courts. No one, as it seems from the return of the justice, appeared upon the return day of the summons to make any objection to the jurisdiction of the magistrate; and the fact that the territorial limits of his district did not include the First avenue, or any portion of it, is not brought to our notice in any judicial form whatever. We are of opinion, therefore, that the proceedings of the justice must be affirmed, and the writ dismissed, with costs.

BRADY, J., concurs.

BARRETT, J. — I concur in this affirmance of the judgment for the reason that the relator took no objection in the court below to the landlord's affidavit; nor, in fact, does he except to it even now. His objection to the jurisdiction proceeds solely upon the fact, which, however, he alleges without proof, that the premises are not situated within the justice's judicial district. Upon that question I entirely agree with my brother that we cannot take judicial notice of street and number. An exception may perhaps be made as to a particular street which is wholly embraced within the boundaries of wards created and defined by statute. For of the latter we can take judicial notice (*Armstrong agt. Cummings*, 20 *Hun*, 313; *The People ex rel. Duchardt agt. Kelly, id.*, 549). If the tenant here had appeared and objected to the affidavit, I should have voted for reversal, for in my judgment every jurisdictional fact must be stated in the affidavit. Consequently the affidavit should have shown upon its face that the premises were within the first judicial district. And I cannot agree that the ordinary presumption in favor of the regularity of official acts

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applies to such statutory proceedings as these (where the jurisdiction is special and limited), at least to the extent indicated by the presiding justice. The effect of the rule suggested on that head would be to reverse the order of things and to require the tenant to furnish the justice with proof of his want of jurisdiction.

SUPREME COURT.

ABEL CROOK, receiver, &c., agt. HELEN FINDLEY and JOHN C. WINTERS.

Receiver — supplementary proceedings — payment of judgment by debtor does not ipso facto discharge receiver.

The payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not *ipso facto* discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his authority, which may be required to be paid before the property held by him can be taken out of his possession.

Special Term December, 1880.

MOTION to restrain a receiver appointed by the marine court from selling certain market stands, upon the ground, among others, that the judgment in the action in which the receiver had been appointed in supplementary proceedings had been satisfied.

Wm. H. Secor, for Mrs. Findley.

E. Yenni, for debtor, A. C. Davis.

Chauncey Shaffer, for Receiver.

DANIELS, J.— The payment of the amount imposed upon Winters as judgment debtor, for his disobedience of the order of the marine court and his interference with the property

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included in the receivership, does not, of course, entitle himself or the defendant Findley to a stay of the receiver's proceedings. For he shows that he has claims for expenses incurred in the exercise of his authority which may still be required to be paid before the debtor, or the property claimed to be owned by him, can be taken out of the receiver's possession. Whether all the lawful demands which he may be warranted in asserting have been satisfied, and the receiver's authority for that reason has come to an end, is a subject over which the marine court which appointed the receiver would seem to have the appropriate jurisdiction. To that tribunal the application to be relieved from the further exercise of his authority should properly be made. The interest in the property which the receiver has advertised for sale is that only of the judgment debtor, and it is stated to be "the right, title and interest of John C. Winters and John Arcularius, in and to the market stands, fixtures and permits." If the defendant Findley owns or has any interest in that property, it is not included nor proposed to be sold by this notice. She can in no way be injured by the sale of the title of these other persons and for that reason has no interest in delaying or preventing it. The proceeding can in no way whatever affect her, and for that reason her present application cannot be allowed to succeed, even if it can be regularly heard here. Then the property appears to be of that peculiar nature as renders a sale of it proper to avoid a complete consumption of its value by the accumulating expenses resulting from its present condition. It is perishable, as it appears at present to be, and should be converted into money, and the proceeds to be held subject to the result of the present contest concerning the title. If the bond of the receiver should be enlarged, the marine court is the proper tribunal to direct that to be done. The motion now before this court will be denied.

On a motion subsequently made in the marine court, under the suggestion contained in the preceding opinion: "1. To cancel the judgment of record; and 2. To discharge the

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receivership." McADAM, J., held: "1. That the payment of the judgment to the sheriff (as part of the debtor's fine for contempt), and the return by that officer, indorsed upon the warrant of commitment, to the clerk of the marine court, accompanied by the money collected, operated as a valid payment of the judgment, and that the defendant was entitled, as of course, to have the same satisfied of record. 2. That such satisfaction was not *ipso facto* a discharge of the receivership, although it, like the discontinuance of an action, put an end to the litigation (2 *Barb. Chy.*, 471), and entitle the debtor to an order discharging the receiver from his trust upon payment of his lawful charges (2 *Daniel's Chy. Pr.* [4th ed.], 1764). 3. That until formally discharged the receiver holds title, as before, to any property in his hand, his possession being that of the court. 4. The receiver was thereupon directed to discontinue two actions which were pending, to the end that his accounts might be passed, his fees taxed, the receivership closed and the property returned (*See* 12 *Hun*, 585, and cases cited)."

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN MURPHY agt. STEPHEN B. FRENCH *et al.*, composing the board of police of the city of New York.

New York (city of)—Police board—their power as to dismissal of a member of the force.

The relator, a policeman, having been convicted by the police board upon a charge of receiving sums of money on several occasions from the keepers of a house of prostitution as an inducement for allowing certain privileges, was dismissed from the force:

Held, that under the law of 1873, giving the board power to dismiss any member on his conviction of a legal offense or neglect of duty, or any conduct injurious to the public welfare, or immoral conduct or conduct unbecoming an officer, though the relator could have been convicted

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and punished for the offense, yet it was not necessary to await a conviction in a court of criminal jurisdiction before instituting the inquiry. There being evidence to uphold the judgment of the board, and no rule of law having been violated, the judgment should not be disturbed.

Special Term, February, 1881.

WRIT of *certiorari* to review the removal of the relator from the police force.

John D. Townsend, for relator.

William C. Whitney, opposed.

VAN VORST, *J.* — By the Laws of 1873, chapter 335, section 5, the board of police have power, in its discretion, to dismiss from the force any member thereof, on his conviction of any legal offense or neglect of duty, or violation of rules, or neglect or disobedience of orders, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer.

It cannot be questioned for a moment that the offense charged against the relator, a member of the force, of receiving sums of money on several occasions from the keeper of a house of prostitution as an inducement for allowing certain privileges in connection with the maintenance of such a house, involved him in immoral conduct unbecoming an officer. It was also, under the rules governing the force, a neglect of duty and clearly injurious to the public welfare. If such conduct could be tolerated it would lead to the demoralization of the entire police force and make it a bane rather than instrument of security. It is quite likely that a member guilty of such practices could, in some legal proceeding in the courts, have been, upon trial, convicted and punished for the offense. But it cannot be necessary, as is urged by the counsel for the relator, for the board of police to await a conviction for the offense in a court of criminal jurisdiction before instituting an

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inquiry into the alleged misconduct, and if it should be established, by evidence, to its satisfaction, it would be its duty to dismiss the offender. A conviction of a member of the force of a legal offense is a ground of removal, and also in its discretion, the board may remove for any neglect of duty or conduct unbecoming an officer, although such misconduct might not amount to an offense punishable in the criminal courts.

It is urged by the learned counsel for the relator, that the proof adduced before the board was insufficient to justify a removal, and the evidence, as well as the character of the witnesses in support of the charges, has been subjected to fair criticism.

It must needs be that the witnesses to such a transaction would be of a questionable character. Persons of known respectability would not be likely to be witnesses of such acts as are imputed to the relator. The relator, under oath, denies the accusation. Several persons have also testified to the good character of the relator. And one cannot but regret the necessity for his dismissal from the service. But the fact of the payment to and receipt by him of the money for the purposes above mentioned, is distinctly sworn to by the party who paid it, and her evidence is corroborated by the testimony of two other persons.

It is quite true that some persons, who are alleged by the principal witness to have been present when the money was paid to the relator, have denied any such occurrence. But these latter witnesses are open to the same criticism bestowed upon the witnesses called to sustain the charges. I cannot say that there was no evidence to uphold the judgment of the board. On the other hand there was evidence. The matter was contested. The board of police was the proper body, under the law, to pass upon the evidence, and to determine the truth amid conflicting statements.

I do not think that I would be justified in substituting my judgment for that of the police commissioners, who seem to have carefully and patiently investigated the charges, and have

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had the advantage of personally seeing and examining the witnesses.

The removal seems to have secured the concurrence of all the commissioners who were present at the investigation. They acted under the responsibility of their office, and unless there was no evidence to uphold their judgment, or some rule of law had been violated, their judgment should not be disturbed.

The *certiorari* should be quashed, and the proceedings of the commissioners sustained.

N. Y. MARINE COURT.

OWEN PRENTISS agt. MORTIMER LIVINGSTON *et al.*

Substitution of attorneys — when and on what terms ordered — Extent of attorney's lien.

The attorney has a lien upon the papers in the suit, which cannot be divested without payment, but he has no lien upon the client, and cannot prevent him from employing another attorney to represent him.

Where motion was made by defendants for substitution of a new attorney:

Held, that the motion should be granted ; but if the defendants desire the papers in the possession of their attorney they must first discharge his lien. If this relief is not insisted upon the order for substitution must provide that the taxable costs in the action to the present time (if collected upon a favorable termination of the action) be paid to the present attorney of the defendants, to whom they equitably belong.

Special Term, February, 1881.

MOTION for substitution of new attorney for defendants.

R. W. Townsend, for motion.

John Livingston, opposed.

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McADAM, J.—The defendants desire to change their attorney; this they have an undoubted right to do. Any employer may remove his employe at any time, and the only redress the latter has is his remedy for wrongful discharge. It is necessary for me to consider only the legal questions which arise upon this motion, and I do not propose to enter into a discussion of the family differences between the defendants and their attorney. With these unpleasanties I have nothing, whatever, to do. The attorney has a lien upon the papers which cannot be divested without payment, but he has no lien upon the client, and cannot prevent him from employing another attorney to represent him, for, as was said by Lord ELDEN, in *Commerell agt. Poynton* (1 *Swanst.*, 1), “a solicitor cannot by virtue of his lien prevent the king’s subjects from obtaining justice.” The motion for a substitution will, therefore, be granted. If the defendants desire the papers in the possession of their attorney they must first discharge his lien, and a reference will be ordered to ascertain and fix its amount. If this relief is not insisted upon the order for substitution must provide that the taxable costs in the action to the present time (if collected upon a favorable termination of the action) be paid to the present attorney of the defendants, to whom they equitably belong (*See re Paschall*, 10 *Wall, U. S. R.*, 483). Settle order on two days’ notice.

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N. Y. COMMON PLEAS.

BENNY AUERBACH agt. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Railroads — Right of company to limit time in which ticket shall be used —
How far passenger bound by such limitation.*

The holder of a limited ticket, bearing an agreement upon its face that it was good only between the date of its purchase and the end of the day designated by the punch mark on its margin, is not entitled to use such ticket after the expiration of such date, if it be the fault of the passenger that the ticket has expired before he has arrived at his destination.

General Term, January, 1881.

Before C. P. DALY, Ch. J.; J. F. DALY and VAN HOESEN, JJ.

A. Blumenstiel, for plaintiff.

Frank Loomis, for defendant.

VAN HOESEN, J. — The ticket which the plaintiff bought at St. Louis on September 21, 1877, bears upon its face the following words: The holder hereof, in consideration of the reduced rate at which this ticket is sold, agrees with the respective companies over whose road such holder is to be carried to use the same on or before the date as canceled by punch on the margin of this contract ticket; and the holder hereof failing to comply with this agreement, either of said companies may refuse to accept this ticket, or any coupons thereof, and demand a full regular fare, which the holder agrees to pay. The date on the margin which was canceled by the punch was September 26, 1877. The ticket was, there-

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for, a limited ticket, which was good between the date of its purchase and the end of the day designated by the punch mark on its margin, but not good after that time. The words are clear and unambiguous, and they expressly say that the ticket was to be used on or before the twenty-sixth day of September, and that the company might reject the ticket and demand full fare from the passenger if it were not so used. Giving to the language the construction which would naturally be placed upon it, it seems plain that the ticket could not be used on the twenty-seventh of September. It is said, however, that the words ought not to be construed so as to make the ticket, which was good at the beginning, bad if the train should not arrive at the end of the day named in the margin. Such a construction is said to be unreasonable. It is not unreasonable, if such be the import of the language of the ticket. Is it not quite as unreasonable to allow a passenger with a limited ticket, which declares that it shall not be good after a certain date, to enter the cars five minutes before midnight of the day specified and then begin a journey that may not end for three or four days afterward. The running of trains, as everybody knows, is regulated by time tables, and a person about to purchase a ticket may always ascertain the time ordinarily taken by the cars to arrive at a given point. He may, if he chooses, know at what time it will be necessary for him to start in order to reach his destination before his ticket, if it be limited as to time, had expired. If he delays his departure, or if for purposes of his own he leaves the train and breaks up his journey, so that the day designated by his ticket as the limit beyond which it will not be accepted has passed before his travel is at an end, he ought not to complain if the railroad company do exactly what the ticket declares it may do—reject the ticket and collect the fare anew. The case is different when he begins his journey in time to reach his destination in the usual course of travel, before the expiration of the limit fixed by the ticket, but is prevented by delays occurring upon the railroad from finishing it in the

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lifetime of the ticket. In such a case he may, without regard to the limit, travel upon the ticket to the point for which he bought it. In short, if it be the fault of the passenger that the ticket has expired before he has arrived at his destination, he must bear the loss and pay the regular fare; but if his failure to reach the point for which the ticket was bought is imputable to the railway company, he is entitled to use the ticket, though the time for which it is limited has passed.

In the case before us there is nothing to show that there was any delay on the part of the company. On the contrary, it appears that the plaintiff himself was responsible for his failure to arrive in New York before the ticket expired. On the afternoon of the twenty-sixth, the last day on which, according to its terms, the ticket could be used, he took the cars at Rochester to come to New York. His ticket was accepted by the company as good and sufficient for the twenty-sixth, and he traveled upon it until he arrived at Hudson, which he did at three o'clock in the morning of the twenty-seventh. The conductor then said that the ticket had expired at midnight, and that as the twenty-seventh of September had come the plaintiff must pay his fare to New York. This the plaintiff would not do, and he was, thereupon, without unnecessary violence put off the train.

I think that he was rightfully put off, and that the judgment should be affirmed, with costs.

Mahon agt. Smith.

SUPREME COURT.

JAMES F. MAHON agt. ALBERT B. SMITH and others.

Deed of settlement in consideration of a wife's relinquishment of her dower right in real estate — Release of wife's claims of dower good consideration to sustain the trust — Assignment of husband's interest, in his lifetime, is a breach of deed of settlement.

Pascal B. Smith and his wife Harriet executed a deed of settlement whereby \$15,000 (the proceeds of real estate conveyed by Mr. Smith, the dower right in which the wife released, and agreed to relinquish her like interest in all other real estate which her husband owned or might thereafter acquire) was transferred to a trustee to pay the income to the wife during the joint lives of husband and wife, and, upon the death of either, to pay the income to the survivor for life; and, after the death of both, to pay the principal sum, one-half to such persons as each respectively should direct by will, or in case of either or both dying intestate, then the share of such intestate to go to his or her personal representatives:

Held, sustaining a demurrer to the complaint as not stating a cause of action, in a suit to recover Mr. Smith's interest, after his death, under an assignment of such interest made by him in his lifetime, that the wife's release of her claims of dower was a good consideration to sustain the trust, and that the said assignment is a breach of the deed of settlement.

Held, that Mr. Smith having parted with all his interest in the fund and dedicated it to the uses and purposes of the settlement, and failed to exercise the right he reserved, the fund must go in the direction which the deed gives it.

Special Term, December, 1880.

DEMURREE to complaint.

A. Pond, for demurrer.

Clifford A. H. Bartlett, opposed.

VAN VORST, J. — The intentions of the parties who created the deed of settlement in this case are disclosed in words clear and unambiguous.

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The moneys the subject of the trust, and which were by the deed fully disposed of, were the proceeds of real estate conveyed by Pascal B. Smith, in which his wife Harriet had an inchoate right of dower. She released her dower right in that real estate, and agreed to relinquish her like interest in all other real estate which her husband owned, or which he might thereafter acquire; and in consideration of such release and agreement on her part, the deed of settlement was executed by herself, her husband and the trustee who was to hold the fund. This release of her claims of dower was a good and valuable consideration for the disposition made by her husband of all his interest in the fund, and of his obligations, expressed in the writing, with respect thereto. Dower is valuable right and is highly favored (*Simar agt. Canaday*, 53 N. Y., 303, *per* FOLGER, J.). By this deed Pascal B. Smith assigned and transferred to Cabrary Morris, and his successors, all his interest in the principal sum of \$15,000 and the income thereof, in trust, to pay the income to Harriet Smith during the joint lives of the husband and wife, and upon the death of either to pay the income to the survivor for life, and, after the death of both, to pay one-half of the principal sum to such persons as Harriet Smith should by her last will and testament direct; and in case she should have left no will, then to the personal representatives of the said Harriet Smith; and to pay the other half of the principal sum to such person as Pascal B. Smith should by his last will direct, or in case of his death without leaving a will, then to the personal representatives of Pascal B. Smith.

The instrument then provides for the security of the investment of the fund by the trustee, and contains in substance a prohibition against the change of investment without the consent of all the parties.

The intention of these parties, husband and wife, with respect to this fund, separated and set apart and sedulously guarded, and in which each had an interest, is quite plain. Not only is the income disposed of during the life of each,

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but the principal sum after their deaths in the event that they died intestate. And this result was reached through the solemn agreement of the parties themselves. Any attempted disposition made by either party to an instrument of this nature in opposition to its terms would be to defeat it.

The wife might willingly agree that her husband should dispose of a portion of the principal of this fund by a last will, in the natural expectation that those who had claims upon his bounty, as offspring of the marriage, would be cared for in such disposition; but if he failed to make such testamentary disposition the desired result would be reached through an administration by his personal representatives under the statutes concerning distribution.

I am, therefore, of the opinion that the assignment made by Pascal B. Smith, in his lifetime, to the plaintiff, of his interest in the fund, is a breach of the deed of settlement. It is in direct opposition to the letter and spirit of the instrument. When the deed provides that the husband may dispose at his death of a part of the fund in a particular manner, and in the event of his failure to make such disposition the fund shall go in a certain direction, he cannot defeat the gift over by the assertion of a right to dispose of it in a way and to a person not contemplated by the deed.

There is nothing upon which the assignment, through which the plaintiff claims, can operate in law or equity, as Pascal B. Smith had parted with all his interest in the fund, and dedicated it to the uses and purposes of the settlement, reserving to himself, however, a certain right which he has failed to exercise, and the funds must go in the direction which the deed gives it. Had Pascal B. Smith disposed of his interest by last will and testament, executed either before or after the assignment to the plaintiff, the legatee must have taken the property; and this shows that the assignment can interpose no valid obstacle to the claim of the personal representatives.

It does not seem to me to be necessary to support by

Miller *et al.* agt. Kent.

authority a proposition so clearly in accord with natural justice, and which rests upon good faith in maintaining the stipulation in deeds of this character. The learned counsel for the plaintiff has been careful to cite many cases which bear more or less upon the general question, but none of them sanctions an act in opposition to the terms of such a deed. As the objection above indicated is fundamental and disposes of the plaintiff's right, it is not deemed necessary to consider the other grounds discussed by the learned counsel for the defendant. As the complaint does not disclose facts sufficient to constitute a cause of action, there must be judgment for the defendant on the demurrer.

SUPREME COURT.

DARIUS MILLER *et al.*, appellants, agt. ELMORE A. KENT,
impleaded, &c., respondents.

Bill of particulars—when should be ordered.

A broker who is the agent of his client is, and ought to be, required to show fully and specifically each item of the account which he charges against his client.

Each of the parties to such an account is entitled to know and to have presented to him, when a demand is made for a loss supposed or real, the items which make up such loss, and to be given an opportunity not only to inspect and ascertain the correctness of the same, but to controvert such items whenever it becomes necessary.

First Department, General Term, October, 1880.

Before DAVIS, P. J., BRADY and BARRETT, JJ.

THIS is an appeal from an order at special term denying plaintiffs' motion for a further bill of particulars. The learned justice admitted plaintiffs' right to a bill of particu-

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lars of defendant's counter-claim in the opinion, but denied the right in the order, as he subsequently settled it. This reconsideration and change of his decision was because defendant's counsel cited *Hoff* agt. *Pentz* (1 *Abb. N. C.*, 288). Plaintiff's appeal is from "each and every part of said order." The following clause in said order, to wit, "and it appearing, and not being controverted, that the bill of particulars already served contains all the items of the account stated alleged as a counter-claim," is a recital which the papers in the case clearly controvert. The action is brought to compel the defendants to account to plaintiffs for the profits on certain extensive purchases and sales of lard which defendants, as commission brokers, made for plaintiffs and others, from August 1, 1879, to January 16, 1880, under an agreement signed by all the defendants, who were to share the profits and losses according to prescribed rules of division. The defendants Kent and Poole were originally parties to that agreement, but subsequently withdrew therefrom and acted solely in the relation of brokers to the plaintiffs and the other defendants. Defendants have refused to furnish any accounts to plaintiffs whatever, and judgment is asked for an accounting. Defendants Kent and Poole, in their answer, admit the agreement, but deny every other allegation in the complaint, "except that large quantities of lard were bought and sold under said agreement." They also claim that plaintiffs were not entitled to an accounting when the action was begun. They further allege that "after the beginning of this action" defendants rendered to plaintiffs an account in which plaintiffs' firm was found justly indebted to the said firm of E. A. Kent & Company in a large sum, to wit, \$11,586.29, which sum said plaintiffs then and there promised and agreed to pay said E. A. Kent & Company." Plaintiffs' reply denies any accounting whatever. The affidavit of plaintiffs show that they had been trying, since October first, to get some information of these purchases and sales, but they could obtain nothing more definite than "Ex. B." The affidavit

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further states the series of motions, discontinuances, frivolous demurrers and other tactics whereby defendants have postponed giving plaintiffs this information. The affidavit further shows that this information was sought by examining defendant before trial. That after defendant had secured a further delay by appeal, he, by his evasive answers, still conceals this information from the plaintiffs. By the defendants' examination, it appears that they profess to be unable to give this information without their books; that they refused to look at their books to get the information; they refused to bring them into court under subpoena; that some of their books were in Chicago; that even if they did look at the books, their knowledge of practical book-keeping was so limited that they couldn't give the information. Defendant in an affidavit read in opposition to plaintiff's demand for particulars says: "That plaintiff's proportionate share is correctly set forth in the 'bill of particulars as served.' "Exhibit B." But this bill of particulars which he calls an account stated, was rendered after the commencement of this action, and contains no items or particulars whatsoever. His counsel evidently served it in the form of an account stated, so as to invoke the authority of *Hoff agt. Pentz*, to defeat plaintiffs in obtaining a bill of particulars. The allegation by defendant in his answer of an account stated and settled, and that plaintiff promised to pay the balance, was reckless and unscrupulous in the extreme. For he admits that he did not serve it till after the action was begun, in which he was charged with gross fraud. His attorney's object in securing such an answer from defendant appears by the following clause in his affidavit: "I believe the bill of particulars of defendant's counter-claim is good and sufficient in law, being a copy of an account stated, which he pleads," and he quotes *Hoff agt. Pentz* in support of his position. These affidavits are substantially the same as were before this Court on defendant's appeal from the order requiring him to be examined before trial. In the opinion of Ch. J. DAVIS, in affirming that order, he used the following

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language (59 *How. Pr.*, 325): "The plaintiffs show to our satisfaction that they could not get such an account of the transactions of the defendants, alleged to have been made on their behalf, as they were clearly entitled to. A commission merchant or broker has no right to conceal from his customer any portion of his business and dealings in relation to the property alleged to have been bought and sold; and where he withholds the fullest information on that subject, the right to examination before trial in an action brought to recover alleged profits, or to adjust the unsettled accounts, should be fully accorded. We are not at all satisfied with the good faith of the alleged proffers of the examination of the defendant's books, &c. The disingenuousness of the attempt thus to defeat the examination of defendant as a witness must have struck the court below as it does this court." The perusal of defendant's testimony taken under that order will, we think, strengthen and confirm the suspicions of this court as to the disingenuousness of defendants.

Adolphus D. Pape, for appellants.

I. Plaintiff is entitled to this information as a matter of right (*Miller agt. Kent*, 59 *How. Pr.*, 325).

II. The only provision under which this right can be enforced is section 531 of Code. The examination of defendant proves that this right cannot be enforced against a disingenuous and unscrupulous party under section 870. The last clause of section 531 is very broad: "The court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party."

III. The office of a bill of particulars is to apprise a party of the specific claims of his adversary, so as to further justice and to prevent surprise at the trial. Chief justice SHAW, in a leading case, said that wherever justice could not be done on the trial without the information to be obtained by a bill of particulars, the court could direct such information to be

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reasonably furnished (*Commonwealth* agt. *Snelling*, 15 *Pick.*, 321). The cases of *Johnson* agt. *Mallory* (2 *Rob.*, 684) and *Vischer* agt. *Conant* (4 *Cow.*, 396) support the right to a bill of particulars, with dates and specifications so "as to enable defendant to meet the charges."

IV. This is pre-eminently a case in which the plaintiffs are entitled to particulars.

V. The fact that the applicant for the bill of particulars is the plaintiff cannot defeat this right. The provision is broad enough to cover this. It says "a bill of particulars for the claim of either party may be ordered delivered to the adverse party." A "claim" as here used is not necessarily a demand for affirmative relief. It means "all causes of action and all grounds of defense, the pleaded stories of both parties, pleas of confession and avoidance, no less than complaints and counter-claims." The above is the language of the general term, common pleas, in case of *Orvis* agt. *Jennings* (6 *Daly*, 447).

VI. The order should be reversed, and defendants, Kent & Co., required to furnish a full bill of particulars, as required in order to show cause.

L. A. Gould, for respondents.

I. The fourth paragraph of the complaint, among other things, avers that the firm of Kent & Co., "did buy and sell under said agreement large amounts of lard;" defendant Kent in the second paragraph of his answer "denies the averments contained in the fourth (and other) paragraphs of the complaint," except this one of the purchase and sale of large quantities of lard. Appellant seeks to compel defendant Kent to furnish a verified bill of particulars of the large quantities of lard which Kent does not deny were bought and sold as plaintiff alleges in his complaint. Section 531 of the Code provides: "The court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party." These "large quantities of lard bought and

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sold" form no part of defendant's claim; this statement is set forth as part of plaintiffs' cause of action. The defendant Kent simply singles out and excepts this averment from his denial of the other statements of the complaint. "The use of a bill of particulars is to apprise a party of the specific demands of his adversary" (*People agt. Monroe Com. Pleas*, 4 *Wend.*, 200; *Matthews agt. Hubbard*, 47 *N. Y.*, 425). "It is regarded as an amplification of the pleading to which it relates" (*Melvain agt. Wood*, 3 *Keys*, 533-536). Now, this is no part of the claim of Kent & Co., but it is a part of plaintiff's demand, and the court has no power to compel Kent & Co. to furnish the plaintiffs a bill of particulars of plaintiffs' claim. Plaintiffs ask an accounting. Should an accounting be decreed them, according to the uniform practice, defendant's firm will be required to produce and verify a full account of these transactions; plaintiffs will have ample opportunity to surcharge or falsify the same, and the account will be finally settled by decree.

II. The remaining branch of the motion is for a bill of particulars which "shall contain a particular account of the matters and transactions referred to in the fourth section of said answer, upon which he claims that the sum of \$11,586.29 is due from plaintiffs to said firm." But this counter-claim pleaded is upon an account stated. At special term in this department Mr. justice LAWRENCE held that "the court cannot require a further or more particular account after service of an account stated alleged in the pleading. An account stated cannot be altered." In *Goings agt. Patten* (1 *Daly*, 168), the court very properly held that the defendant might join in his pleading an account stated * * * and a claim upon an open account in case the proof of stating and settling the account should fail; but if he declines to furnish the items of the open account, if demanded, he must be presumed to elect to rely upon his plea of an account stated alone. Here, respondent relies upon the account stated solely; he pleads nothing else, and desires to offer no other proof at the trial to

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sustain his counter-claim ; appellant, therefore, cannot be surprised ; he knows every item of respondent's claim. If defendant fails to prove the stating and settling of the account he would wholly fail upon this issue ; if he does prove it he will succeed irrespective of original items.

PER CURIAM. — We see no good reason why the bill of particulars should not have been ordered. A broker, who is the agent of his client, is and ought to be required to show fully and specifically each item of the account which he charges against his client. In this case nothing is furnished but a gross sum amounting to \$7,724.19, with which the plaintiff is charged as his share of the losses upon the purchases and sales of lard, on a joint account between the plaintiffs and others, under a contract described in the affidavit. Each of the parties to such an account is entitled to know and to have presented to him, when a demand is made for a loss supposed or real, the items which make up such loss, and to be given an opportunity not only to inspect and ascertain the correctness of the same, but to controvert such items whenever it becomes necessary.

The order appealed from should be reversed, and an order entered requiring the service of a bill of particulars.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE LONG ISLAND RAILROAD COMPANY and THE ATLANTIC AVENUE RAILROAD COMPANY OF BROOKLYN.

Railroads — Right of defendants to use steam power upon Atlantic avenue in the city of Brooklyn — Constitutional law.

The Long Island Railroad Company was incorporated April 24, 1834 (*chap. 178, Laws of 1834*), and by virtue of an act of the legislature, passed April 2, 1836 (*chap. 94, Laws of 1836*), it, on the first day of December, 1836, leased a road belonging to the Brooklyn and Jamaica Railroad Company, a corporation formed under chapter 256 of Laws of 1834. Until the consummation of the proceedings had under and in pursuance of chapter 484 of Laws of 1859, the Brooklyn and Jamaica railroad and its lessee, the Long Island Railroad Company, had a right to operate a railroad by steam over and upon lands, the principal part of which is now Atlantic avenue, in the city of Brooklyn. When the act of 1859 was passed, the defendant, "The Long Island Railroad Company," reached the East river by a tunnel under the surface of Atlantic avenue. The act of 1859 (*chap. 484, Laws of 1859*) was entitled "An act to provide for the closing of the entrances of the tunnel of the Long Island Railroad Company in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city." The provisions of this act were substantially carried out. The agreement of the commissioners appointed under the act of 1859, providing for the closing of the tunnel and the surrender of the right to use steam upon the avenue, was with the Brooklyn and Jamaica Railroad Company, who, as the lease originally executed by them to the Long Island Railroad had been surrendered, are styled therein "the assignees of the Long Island Railroad Company, within the true meaning and intent of both the said acts," to wit, the said act of 1859, and another relating to the same subject, passed March 23, 1860. The contract required the tunnel to be closed, and the various things done which the law of 1859 enjoined, and the Brooklyn and Jamaica Railroad Company relinquished "its right to use steam within the corporation limits of the city of Brooklyn," and agreed that "steam power shall not be used or permitted upon its road, or any part thereof, within the limits of the city of Brooklyn," after the happening of an event specified in

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the agreement. To this contract the Long Island Railroad assented, "so far as it has any right so to do, and so far as it has any interest therein." The compensation which the Brooklyn and Jamaica Railroad Company received under this agreement was \$125,000, which was levied upon a district prescribed by the said act of 1859, and which was supposed to be specially benefited by the abandonment of the use of steam power upon Atlantic avenue. On April 5, 1855, the Brooklyn and Jamaica Railroad Company executed to Samuel Willetts, Robert Ray and Alexander Hamilton, Jr., as trustees, a mortgage to secure its bonds to the amount of \$100,000. This mortgage covered all its property, including that leased to the Long Island Railroad Company. On the 21st of March, 1872, a decree of sale (in a suit to foreclose this mortgage) was made, such sale to be "subject to a certain agreement or release made between the Brooklyn and Jamaica Railroad and the Long Island Railroad Company, dated April, 1860" (it being an agreement between those two companies, and not the one between the Brooklyn and Jamaica Railroad Company and the commissioners appointed under the act of 1859), "and subject also to the provisions of the act of 1859," and subject also to the provisions of a certain other act passed April 16, 1860, entitled "An act authorizing the Brooklyn Central and the Brooklyn and Jamaica Railroad Companies to consolidate, and continue their roads so far as such provisions of said acts relate to the closing of the tunnel in Atlantic street, in the city of Brooklyn, and the relinquishment of steam power within the limits of said city." Under this decree of foreclosure the property of the Brooklyn and Jamaica Railroad was sold, and one William Richardson became the purchaser, the property being bought subject to the condition contained in the decree. On the 29th day of April, 1872, in pursuance of the act, entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, a railroad corporation was formed under the name of "The Atlantic Avenue Railroad Company of Brooklyn." To this corporation, on the 28th day of February, 1874, William Richardson, the purchaser at the foreclosure sale, conveyed the property bought thereat, and which in the deed is described as "all and singular the railroad of the Brooklyn and Jamaica Railroad Company, extending from its commencement at the ferry at the foot of Atlantic street, in the city of Brooklyn, in Kings county, to its termination in the village and town of Jamaica, in the county of Queens, including all its appendages and the depot lots in the village of Bedford, and the right to construct branches to Flushing or Flatbush, as secured to the said The Brooklyn and Jamaica Railroad Company by their act of incorporation." On the 26th of March, 1877, the Atlantic Avenue Railroad Company leased to the Long Island Railroad Company, "its successors and assigns, all the railroad of the

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party of the first part, extending from its eastern terminus in the village of Jamaica, westward to the city line of the city of Brooklyn in Atlantic avenue, and thence along said avenue to a point in Atlantic avenue in the city of Brooklyn, 250 feet east of the easterly line of Flatbush avenue, said 250 feet to be measured along a line in the centre of Atlantic avenue," and also sundry other property as is in the lease specially provided. By chapter 187 of the Laws of 1876, it was declared "it shall be lawful for the Atlantic Avenue Railroad Company of Brooklyn, and for the Long Island Railroad Company, as lessee from the Atlantic Avenue Railroad Company of Brooklyn, of that part of the railroad of said Atlantic Railroad Company which extends from the junction of Atlantic and Flatbush avenues, in the city of Brooklyn, eastwardly along said Atlantic avenue, to the city line, to run cars over said railroad, upon Atlantic avenue, from the city line of Brooklyn to Flatbush avenue, by steam power, subject to such rules and regulations as to rate of speed and public safety "as from time to time the common council of the city of Brooklyn may prescribe." Under this law the defendants were, when this suit was commenced, adapting and changing the horse railroad track to that of a steam railway, and are now propelling cars thereon by steam. Against this the plaintiffs ask an injunction, because, as they allege, by the acts closing the Atlantic tunnel, and the agreements thereunder, the defendant, the Long Island Railroad Company, has agreed never to run cars propelled by steam over such route, and that the property was purchased at mortgage foreclosure sale charged with such a prohibition; and also because, as is claimed, the act of 1876 is unconstitutional:

Held, first, that the Long Island Railroad Company has not made any agreement or promise obligating itself not to use steam either upon Atlantic avenue or elsewhere.

Second. As the decree in the foreclosure suit provided that the sale was subject to the provisions of the agreement between the two companies, and as such agreement only obligated the Brooklyn and Jamaica Railroad Company to the Long Island Railroad Company not to use steam cars upon the avenue, which agreement was for its own benefit, and as it had not bound itself to any one in the same direction, it follows that when the Long Island Railroad Company acquired title to the roadway there was no prohibition as to them preventing a legislative license for the use of steam power thereon. The Long Island Railroad Company cannot be bound by the provision in the mortgage foreclosure decree, because the contract was to and with it, and not by it.

Third. As to the other exceptions and reservations contained in the decree of foreclosure—relating to the acts under which the tunnel was closed—nothing therein contained prevented these defendants, or either

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of them, from acquiring a future right to use steam upon the avenue. The surrender of a right existing by its owner is no covenant against a future acquirement thereof, any more than a sale of present interest in any property or business is an agreement against a future repurchase.

Fourth. That no contract whatever existed by force of the act of 1859 preventing the state in the future from conferring the right to use steam on Atlantic avenue, Brooklyn, upon the defendants. Nor can one legislature by a law deprive a succeeding one, in a matter of public policy, from changing or altering the enactment.

Fifth. That no agreement has been made either with the people, the city of Brooklyn or the owners of the property in the district taxed under the act of 1859, which will justify the maintenance of this action.

Sixth. That a railroad corporation cannot, by contract, when no statute authorizes it so to do, bind itself to a particular mode of propelling power, regardless of the interests of the people, which may require it to adopt a different one.

Seventh. The statute (*Laws of 1876, chap. 187*) under which the defendants claim the right to use steam upon the avenue, is not obnoxious to section 1 of article 14 of the Constitution of the United States, declaring, among other things, that no state can "deprive any *person* of life, liberty or *property* without due process of law," nor to section 6 of article 1 of the Constitution of this state, which likewise provides that "no *person* shall * * * be deprived of life, liberty or *property* without due process of law."

Eighth. That when, as against the owners of the land, the right to operate a railroad has been acquired, the mode of such use, whether by steam or otherwise, is a matter within legislative control, and in regulating such use, no right of property is infringed upon, to which the above cited provisions from the federal and state Constitutions are applicable.

Ninth. That the act (*Laws of 1876, chap. 187*) is not unconstitutional under section 18 of article 3 of the Constitution, which prohibits the legislature from passing "a private or local bill * * * granting to any corporation, association or individual the right to lay down railroad tracks;" or "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

The act of 1876 confers "no right to lay down railroad tracks." The privilege so to do was one already enjoyed by both defendants as already existing railroad corporations. The act gave legislative permission to use steam as a motive power on railroad tracks already constructed, the right to relay and repair which was an incident to the original grant. Such a legislative permission to an existing corporation is not covered by the above constitutional provision.

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Nor do the defendants obtain under the law an "exclusive privilege" or "franchise." The prohibition is to a grant which *in words* is exclusive. It may be true that conferring upon A. authority to do an act, may practically prohibit B. from doing the same thing, because the latter may be unwilling to compete with the former; but so long as B. is left free to act, and nothing has been done which, if valid, would enable A. to enjoin B., because he (A.) has an exclusive right, the provision in the Constitution is not violated.

Tenth. That if there is a defect in the title to any of the land occupied by the defendants, such defect does not justify this action, but each owner of the land wrongfully held must seek his remedy by suit brought in his own name.

Albany Circuit and Special Term, June, 1880.

Simon Sterne and Samuel Hand, for plaintiff.

E. B. Hinsdale and B. F. Tracy, for defendants.

WESTBROOK, J. — The relief asked in this action is to perpetually enjoin the defendants from using Atlantic avenue, in Brooklyn, for the purposes of a steam railway, and the cause is brought to a hearing upon pleadings and proofs, a part of the evidence having been taken in court and a part before a referee. Such pleadings and proofs are contained in two printed volumes, the one of 902 pages and the other of 637 pages; and if a decision has been somewhat delayed, counsel will remember that the cause was submitted for their accommodation during a recess of court, with the explanation of an accumulation of older cases which would be disposed of before this could be considered.

The Long Island Railroad Company was incorporated April 24, 1834 (*chapter 178, Laws of 1834*); and by virtue of an act of the legislature of this state, passed April 2, 1836 (*chapter 94 of Laws of 1836*), it, on the 1st day of December, 1836, leased a road belonging to the Brooklyn and Jamaica Railroad Company, a corporation formed under chapter 256 of the Laws of 1834.

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Upon the consideration of this case, it will be assumed that, until the consummation of the proceedings had under and in pursuance of chapter 484 of the Laws of 1859, the Brooklyn and Jamaica Railroad, and its lessee, the Long Island Railroad Company, had a right to operate a railroad by steam over and upon lands, the principal part of which is now Atlantic avenue, in the city of Brooklyn. This has been so held in two cases, the one in the circuit court of the United States for the eastern district of New York (*Miller agt. The Long Island Railroad Company*), decided by judge BLATCHFORD, and the other in this court (*Barnes agt. The Atlantic Avenue Railroad Company of Brooklyn, and The Long Island Railroad Company*), decided by judge GILBERT; and as early as the year 1850 the right of the defendant, the Long Island Railroad Company, to occupy a part of Atlantic avenue for railway purposes was affirmed (*Plant agt. Long Island Railroad Company*, 10 Barb., 26; see, also, *Dunham agt. Williams*, 37 N. Y., 51, and especially page 254). The road had, prior to such act, been so used for many years, and if any technical defect exists in the title of any part of the railway bed or property occupied by them, the right of the true owner or owners thereof, if not lost by lapse of time, must be enforced by them as individuals, and such defect of title furnishes no ground for the maintenance of this action by the people, the alleged basis of which is the creation by the defendants of a public nuisance.

When the act of 1859 was passed the defendant, "The Long Island Railroad Company," reached the East river by a tunnel under the surface of Atlantic avenue. The act of 1859, to which reference has just been made, was entitled (*chapter 484, Laws of 1859*) "An act to provide for the closing of the entrances of the tunnel of the Long Island Railroad Company in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city." The method of accomplishing the objects set forth in the title

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of the law was as follows: A territory, the property in which was to be assessed to accomplish its purposes, was defined. The common council of the city of Brooklyn, on the petition of a majority of the owners of the land in such district, were required to apply to the supreme court for the appointment of three commissioners, whose duty it was declared to be "to enter into a contract, in writing, with the Long Island Railroad Company, or its assigns, that they shall close the entrances of the tunnel in Atlantic street in the city of Brooklyn, and restore and regulate the same to the proper grade, and also for the relinquishment by said company and its assigns of the right to use steam power within said city;" and also obligating the said company or its assigns to construct a surface railroad upon said street, and to run horse cars for the transportation of freight and passengers between the South Ferry at the East river and the city line at East New York, then connecting with steam cars at the times and in the manner as are in the act specified. The Long Island Railroad Company was also to be obligated by the agreement, to be made under the act, to make sundry improvements upon the streets occupied by them, and the commissioners were directed to assess upon the property within the district designated in the law a sum not exceeding \$130,000, no more than \$125,000 of which was to be paid to "The Long Island Railroad Company or its assigns * * as compensation for the compliance with such contract, and the surrender of the right of said company, and the Brooklyn and Jamaica Railroad Company to use steam within the city limits," and a sum not exceeding \$5,000 "to cover all the expenses of collecting the same and executing this commission."

The provisions of this act were substantially carried out. The Long Island Railroad Company surrendered its lease to the Brooklyn and Jamaica Railroad company, and also all its rights in and to the tunnel, and to the compensation provided for by the law, and the Brooklyn and Jamaica Railroad Company on its part agreed with the Long Island Railroad that

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"the use of steam power shall cease upon the present or any future track of the Brooklyn and Jamaica Railroad Company, its successors or assigns, or any persons or corporations claiming under it, or using its tracks or lands, within the limits of said city; and that no steam-engine or locomotive shall be at any time hereafter used, or suffered or permitted by the Brooklyn and Jamaica Railroad Company within the said city limits, or by its successors or assigns, or any persons or corporations claiming under them; and that the said Brooklyn and Jamaica Railroad Company, its successors and assigns, shall and will insert in any conveyance, grant or demise of their said road or franchises, a covenant to the same effect by the grantee, in such form that it shall enure to the benefit of the Long Island Railroad Company, its successors or assigns; and it is expressly understood that the said Long Island Railroad Company shall, in case of any attempt to use steam, in violation of the agreements herein contained, be entitled in its own name to have an injunction against its use, and to have the covenants of the Brooklyn and Jamaica Railroad Company herein contained specifically enforced."

The agreement of the commissioners appointed under the act of 1859, providing for the closing of the tunnel and the surrender of the right to use steam upon the avenue, was with the Brooklyn and Jamaica Railroad Company, who are styled therein "the assignees of the Long Island Railroad Company, within the true meaning and intent of both the said acts," to wit, the said act of 1859, and another relating to the same subject, passed March 23, 1860. The contract required the tunnel to be closed, and the various things done which the law of 1859 enjoined, and the Brooklyn and Jamaica Railroad Company relinquished "its right to use steam within the corporation limits of the city of Brooklyn," and agreed that "steam power shall not be used or permitted upon its road, or any part thereof, within the limits of the city of Brooklyn," after the happening of an event specified in the agreement. The consideration paid to the Brooklyn

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and Jamaica Railroad Company for the surrender of its rights was the assignment to it of the assessment upon the property made upon the district designated in the act of 1859, from which it was to receive \$125,000. To this contract the Long Island Railroad Company assented, "so far as it has any right so to do, and so far as it has any interest therein," by the insertion of a clause to that effect in the agreement between the Brooklyn and Jamaica Railroad Company and such commissioners, and by signing said agreement through its then president, William E. Morris.

On April 5, 1855, the Brooklyn and Jamaica Railroad Company executed to Samuel Willetts, Robert Ray and Alexander Hamilton, Jr., as trustees, a mortgage to secure its bonds to the amount of \$100,000. This mortgage covered all its property, including that leased to the Long Island Railroad Company. A suit to foreclose this mortgage was instituted in this court, to which the Long Island Railroad Company was a party, and served an answer, in which was set out the surrender of its lease to the Brooklyn and Jamaica Railroad, and the various contracts and agreements made under the aforesaid act of 1859, and which have been hereinbefore detailed.

On the 21st day of March, 1872, a decree of sale in the foreclosure action was made, such sale to be "subject to a certain agreement or release made between the Brooklyn and Jamaica Railroad and the Long Island company, dated April, 1860" (it being the same agreement the provisions of which have been recited in this opinion), "and subject also to the provisions of an act of the legislature of the state of New York, passed April 19, 1859, entitled" (the title is given in full), "and subject, also, to the provisions of a certain other act of said legislature, passed April 16, 1860, entitled 'An act authorizing the Brooklyn Central and the Brooklyn and Jamaica Railroad Companies to consolidate,' and continue their roads so far as such provisions of said acts relate to the closing of the tunnel in Atlantic street, in the city of Brooklyn, and the relinquishment of steam power within the limits

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of said city, which acts are referred to in the answer of said defendant, the Long Island Railroad Company."

Under this decree of foreclosure the property of the Brooklyn and Jamaica Railroad was sold on the 28th day of September, 1872, and at such sale one William Richardson became the purchaser, the property being bought subject to the condition contained in the decree.

On the 29th day of April, 1872, in pursuance of the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, a railroad corporation was formed under the name of "The Atlantic Avenue Railroad Company of Brooklyn." To this corporation, on the 28th day of February, 1874, William Richardson, the purchaser at the foreclosure sale, conveyed the property bought thereat, and which, in the deed is described as "all and singular the railroad of the Brooklyn and Jamaica Railroad Company, extending from its commencement at the ferry at the foot of Atlantic street, in the city of Brooklyn, in Kings county, to its termination in the village and town of Jamaica, in the county of Queens, including all its appendages, and the depot lots in the village of Bedford, and the right to construct branches to Flushing or Flatbush, as secured to the said The Brooklyn and Jamaica Railroad Company by their act of incorporation."

On the 26th of March, 1877, the Atlantic Avenue Railroad Company leased to the Long Island Railroad Company "its successors and assigns, all the railroad of the party of the first part, extending from its eastern terminus in the village of Jamaica, westward to the city line of the city of Brooklyn, in Atlantic avenue, and thence along said avenue to a point in Atlantic avenue, in the city of Brooklyn, two hundred and fifty feet east of the easterly line of Flatbush avenue, said two hundred and fifty feet to be measured along a line in the centre of Atlantic avenue," and also sundry other property as is in the lease specially provided.

By chapter 187 of the Laws of 1876, it was declared, "It

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shall be lawful for the Atlantic Avenue Railroad Company of Brooklyn, and for the Long Island Railroad Company, as lessee from the Atlantic Avenue Railroad Company of Brooklyn of that part of the railroad of said Atlantic Avenue Railroad Company which extends from the junction of Atlantic and Flatbush avenues, in the city of Brooklyn, eastwardly along said Atlantic avenue to the city line, to run cars over said railroad, upon Atlantic avenue, from the city line of Brooklyn to Flatbush avenue, by steam power, subject to such rules and regulations as to rate of speed and public safety as, from time to time, the common council of the city of Brooklyn may prescribe."

Under this law, and in conformity therewith, and with the regulations of the common council of the city of Brooklyn, the defendants were, when this suit was commenced, adapting and changing the horse railroad track to that of a steam railway, and are now propelling cars thereover by steam. Against this the plaintiffs ask an injunction, because, as they allege, by the acts closing the Atlantic avenue tunnel, and the agreements thereunder, the defendant, The Long Island Railroad Company, has agreed never to run cars propelled by steam over such route, and that the property was purchased at mortgage foreclosure sale, charged with such a prohibition; and also because, as is claimed, the act of 1876 is unconstitutional. These points will now be considered.

As to the alleged agreement by the Long Island Railroad Company not to use steam for moving cars upon Atlantic avenue, I feel constrained to say, though the contrary was strongly asserted upon the argument, that I have failed to find any covenant by it to that effect. It is true that when the act of 1859 became a law, it was drawing cars by steam power upon such avenue, but this was under a lease it held from the Brooklyn and Jamaica Railroad Company. To enable the last named company to avail itself of the provisions of that act, and for other considerations in the agreement between the two companies specified, it surrendered to that

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company its lease and property upon the avenue, and obligated that company (the Brooklyn and Jamaica), its successors and assigns to it (the Long Island Railroad Company), and to no other party or parties, not only to refrain from the use of steam cars upon Atlantic avenue, but anywhere "within the limits of said city," but it has not made any agreement or promise obligating itself not to use steam either upon Atlantic avenue or elsewhere. Unless then, in the voluminous papers submitted to me, some agreement to that effect has been overlooked, this action against these defendants must fail, so far as it may depend for success upon any contract by the defendants, or either of them, not to do that which the plaintiffs seek to enjoin.

In the statement just made — that the Long Island Railroad Company has not agreed that it would never use steam as a motive power for cars upon Atlantic avenue, but that the Brooklyn and Jamaica Railroad Company has so obligated itself "for the benefit of the Long Island Railroad Company" — will be found the answer to the argument founded upon the fact that the Long Island Railroad Company now holds the property charged with the conditions impressed upon it by the decree of foreclosure against the Brooklyn and Jamaica Railroad Company, subject to which Mr. Richardson made his purchase, and under which purchase, by virtue of his deed to the Atlantic Avenue Railroad Company, and the lease of the latter to it, the Long Island Railroad Company enjoys its alleged rights. As the decree provided that the sale was subject to the provisions of the agreement between the two companies, and as such agreement only obligated the Brooklyn and Jamaica Railroad Company to the Long Island Railroad Company not to use steam cars upon the avenue, which agreement was for its own benefit, and as it had not bound itself to anyone in the same direction, it follows that when the Long Island Railroad Company acquired title to the roadway there was no prohibition as to them preventing a legislative license for the use of steam power thereon. Pos-

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sibly the original purchaser, Mr. Richardson, or his immediate assignee, the Atlantic Avenue Railroad Company, might have been bound by the provision in the mortgage foreclosure decree, but the Long Island Railroad Company cannot be, because the contract was to and with it, and not by it. As to the other exceptions and reservations contained in the decree of foreclosure—relating to the acts under which the tunnel was closed—it will presently be seen, that nothing therein contained prevented these defendants, or either of them, from acquiring a future right to use steam upon the avenue.

Let us now examine the argument, which seeks to deduce from the act of 1859, an agreement between the State and the owners of the property assessed, to the effect that the use of steam should be forever prohibited upon the avenue.

There is certainly nothing in the law indicating an agreement on the part of any person. There is no voluntary payment to be made for the surrender of existing rights, nor for an agreement as to future conduct. The act simply provides for the raising of \$130,000 upon a district, which is defined, for the purpose, among other things, of procuring "a contract in writing with the Long Island Railroad Company, or its assigns, that they shall close the entrances of the tunnel in Atlantic street, in the city of Brooklyn, and restore and pave and regulate the same to its proper grade, and also for the relinquishment by said company and its assigns of the right to use steam power within said city." Instead of the payment being voluntary by the owners of the property within the district, we know from the history of litigation in this state, as contained in the reports, that payment of the assessments under the law was resisted; and their legality was sustained upon the ground that it was the exercise of the taxing power of the state (*Litchfield agt. Vernon, and People ex rel. Crowell agt. Lawrence and others, Commissioners*, 41 N. Y., 123; *Litchfield agt. McComber*, 42 *Barbour*, 288). The extract above given from the act shows for what purpose the assessment was made, and the money paid. No agreement was

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required to be exacted from the Long Island Railroad Company or its assigns, in regard to the future use of steam, but only one requiring the closing of the entrances to the tunnel, the restoration of the street and the "relinquishment * * * of the right to use steam power within said city." Bearing in mind that the right to use steam then existed, the language is easily understood. The surrender of a right existing by its owner is no covenant against a future reacquirement thereof, any more than a sale of present interest in any property or business, is an agreement against a future repurchase. Perhaps the owners of the property on Atlantic avenue, who were instrumental in obtaining the legislation and the consummation of the proceedings authorized by law, expected that steam would not thereafter ever be used thereon as a propelling power, but whatever their expectation in that regard was, it is certain that they have failed to insert any such prohibition in the statute. But even though it had been embodied in the act, it would have been ineffectual to control a subsequent legislature. It is beyond the power of the law-making authority of a state to control future legislation upon matters of public interest. Such a doctrine, if sustained by the courts, would bar all progress, and restrain growth and prosperity by legal barriers, which would be undurable. It is unnecessary, however, to reason either upon the effect of the language in the act of 1859, or its validity, if it could be construed as claimed by the counsel for the plaintiffs. The case of *Newton and others agt. Commissioners of Mahoning* (vol. 21, *Albany Law Journal*, page 350 — date of publication of journal, May 1, 1880, and now reported in 10th *Otto*, 548), decided by the supreme court of the United States, settles every question thereunder. It was sought in that action to restrain the removal of the county seat of Mahoning county, Ohio, from Canfield to Youngstown. The location had been made at the former place by an act of the legislature of that state passed in 1846, which declared it should be "permanently established" there upon the fulfill-

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ment of certain prescribed terms and conditions, which were fully complied with. After the county seat had remained at Canfield for about thirty years, in 1874 another act was passed removing it to Youngstown. It was held by the court, Mr. justice SWAYNE writing the opinion, "(1.) That the contract clause of the Constitution had no application. (2.) That the act of 1846 was a *public law* relating to a *public subject*, with respect to which a prior had no power to bind a subsequent legislature. (3.) Conceding there was a contract as claimed, it was satisfied on the part of the state by establishing the county seat at Canfield, *with the intent* that it should remain there. (4.) There was no stipulation that the county seat should be *kept* or *remain* there in perpetuity. (5.) The rule of interpretation in cases like this, as against the state, is, that nothing is to be taken as conceded, but what is given in express and explicit terms, or by an implication equally clear. Silence is negation, and doubt is fatal to the claim" (*See, also, The People agt. Roper*, 35 N. Y., 629).

Upon both reason and authority, then, we are constrained to decide that no contract whatever existed by force of the act of 1859, preventing the state in the future from conferring the right to use steam on Atlantic avenue, Brooklyn, upon the defendants, and it will next be considered whether any actual agreement has been made by any one, either with the general public or property holders, or the city of Brooklyn, that steam power should not be thereafter used to propel cars upon Atlantic avenue.

It has been already said that the Long Island Railroad has made no such covenant, but it is proper to refer to it again in this connection. A reference to its contract with the Brooklyn and Jamaica Railroad Company makes the assertion that such company has not so agreed clear. The former corporation was about to change its eastern terminus from the South Ferry to Hunter's Point, and was desirous, as it surrendered its lease to the latter, to prevent it (the Brooklyn and Jamaica Company) from using steam within the city of Brooklyn, not

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only for the benefit of property holders on Atlantic avenue, but "also for the private interests of the Long Island Company connected with its change of location," and it therefore exacted from the Brooklyn and Jamaica Railroad Company an agreement to itself to abandon forever the right to use steam within the city limits, with an express stipulation that it (the Long Island Railroad Company) should, in case steam was ever so used by the Brooklyn and Jamaica company or its assigns, "be entitled in its own name to have an injunction against its use and to have the covenant of the Brooklyn and Jamaica Railroad Company," in such agreement contained, "specifically enforced."

To the agreement subsequently made between the Brooklyn and Jamaica Railroad Company and the commissioners appointed under the act of 1859, the Long Island Railroad Company was not a party as a covenantor. It (the latter) had surrendered to the former all its rights acquired by the lease, and had obligated it (the Brooklyn and Jamaica Railroad Company) to itself (the Long Island Railroad Company) not to use steam within the city limits, and it simply gave its consent to the Brooklyn and Jamaica company making such covenants as it pleased. The contract is expressly declared to be "between the Brooklyn and Jamaica Railroad Company, party of the first part, and the said Theodore F. King, John L. Lawrence and John Winslow, commissioners, * * parties of the second part." The covenants and obligations are only those of the Brooklyn and Jamaica Railroad Company, to which the Long Island Railroad Company assented (*i. e.*, that the former might bind itself as it chose), because, to use the language of the agreement, it was "thought advisable" that it should "assent" thereto, and it therefore did "so far as it had any right so to do, and so far as it has any interest therein."

Before proceeding to consider the agreement which was made between the Brooklyn and Jamaica Railroad Company and the commissioners appointed under the act of 1859, it

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should be borne in mind that, as that statute prescribed the terms to be exacted thereunder, such contract is valid only to the extent of the power conferred by such law ; and also, that the franchise now claimed by the defendants is not derived from the Brooklyn and Jamaica Railroad, but under a law of the state enacted in 1876. It is not, therefore, very important for the purposes of this case, to consider what obligations that corporation has incurred, but it may not be improper briefly to consider them.

There is, as has been previously argued, a wide difference between the surrender of a franchise, with an agreement not to exercise *it* (that is, *the present right* which is surrendered), and a covenant against an acquisition of a *new right* thereafter. Such a construction of the language of the agreement we are considering is not technical, but the reverse. Corporations are created for the public good, and any contract, which one may have made, abridging its powers, which should ever remain in full force to be exercised for the convenience of the public as it may require, should be construed, if possible, in accordance with the public interests, and not against them. Whether an agreement by a railroad company, which cripples its ability to fill the public needs is valid at all, is a question which will be hereafter discussed. We are now dealing with another, which is, did the Brooklyn and Jamaica Railroad Company, by its agreement with the commissioners, agree never thereafter to acquire a new right or franchise for the use of steam within the city? The corporation was simply surrendering property and rights it then possessed, and in speaking of such surrender, the language relied upon by the counsel of the plaintiffs is employed. It obligated itself to perform all things required by the act of 1859, and the act of 1860 (*chap. 100 of Laws of 1860*), and then, as a time had to be fixed for the termination of the then existing right to use steam within the city, it provided that "steam power shall not be used, or permitted upon its road, or any part thereof within the city of Brooklyn, at any time or times after the

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completion of said new road between Jamaica and Hunters Point." A reference to the act of 1860, just spoken of, will show the significance of this language, and develop its full meaning. That statute provides for the assignment of the assessment, levied under the law of 1859, to the company, with power to it to collect the same, in lieu of the payment to it of the money itself, upon, among other conditions, the company's "agreeing to discontinue the use of steam within the limits of said city upon completion of their new road from Jamaica to Hunters Point." It was in execution of this clause in the law of 1860 that the language in the agreement was used. It provided for the discontinuance of a present franchise only, and any attempt to give it a wider meaning is a straining of the words beyond their natural and, as it seems to me, their plain meaning.

Having reached the conclusion that no agreement has been made either with the people, the city of Brooklyn or the owners of the property in the district taxed under the act of 1859, which will justify the maintenance of this action, it is proper also to state that whilst the existence of such an obligation has been discussed its validity, if made, is not conceded. Very clearly, as has been shown elsewhere, a legislature cannot, in a matter of public policy, bind its successors, and a similar principle applies to corporations created for the public good. Railroad companies are formed to promote the general convenience, and to serve the general interests of communities. The convenience and interests of the general public are shifting and changing, and as a railroad company is under a moral obligation at least, if not a legal one, to serve the public to the extent of its ability, it cannot so hamper itself by an agreement, as to make impossible the fulfillment by it of one of the most important objects of its creation. It is unnecessary to consider whether, if a corporation agrees not to do in the future something which the law will permit, and the general public convenience may then require to be done, and although it has received a consideration for its agreement, it

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still does what it agreed it would not do, an action will lie for damages, or to recover the consideration paid, as that point is not involved in this action. The precise question is, can a railroad corporation, by contract, when no statute authorizes it so to do, bind itself to a particular mode of propelling power, regardless of the interests of the people, which may require it to adopt a different one? If it can, then progress may be checked, and if such a principle had in adoption been coeval with the invention of the railroad, a continent might not now be spanned, and all the dwellers of a country greater in extent than any on earth, might not then have been, as they now are, neighbors, by means of those roadways of iron and steel, the distance over which steam has so lessened. It is apparently easy to point out cases of individual hardship by the proximity of a railroad to a dwelling or place of business. Such instances may be found in the open country, as well as in the densely populated metropolis, but arguments based thereon, generally more plausible than sound, cannot establish a principle, which will enable the opposers of right progress to force by contract upon an infant enterprise barriers thereto, from which escape shall be impossible, and the attempted fulfillment of what may be the highest needs of its creation useless.

The remaining questions in the cause are upon the validity of the law (*chap. 187 of Laws of 1876*) under which the defendants claim the right to use steam upon the avenue, the language of which has been hereinbefore given. To that act various objections founded upon constitutional provisions are made, which will now be considered :

First. It is contended that such statute is obnoxious to section 1 of article 14 of the Constitution of the United States, declaring, among other things, that no state can "deprive any *person* of life, liberty or *property* without due process of law," and also to section 6 of article 1 of the Constitution of this state, which likewise provides that "no *person*

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shall * * * be deprived of life, liberty or *property* without due process of law."

To this objection it may be answered, that assuming it to be true that some "person" has, under the color of that act, had *his* "property" taken, how does that fact justify this suit by the people? If any individual is unlawfully deprived of his property by another, the remedy is by an action in his own behalf; and when the separate property of several different individuals has been taken wrongfully, by either a natural or an artificial being, each one must seek redress for his own wrong by his own suit. There is no rule of law or practice which enables different parties, whose several and separate properties have been taken, to bring one action in the name of the people, in which one suit, their several and distinct rights depending, perhaps, upon evidence and principles which are unlike, may be all settled and adjusted. We are entirely unable then, to discover how the provisions of either the federal or state Constitution can be successfully invoked to aid this action, if the fact was that property of individuals would be taken thereunder without compensation. But the act was neither intended to, nor does it accomplish such a purpose. It was designed to confer a privilege, without which, perhaps, the use of steam might have been unlawful. The people, having by an express law conferred the right to use steam upon the avenue, cannot, in an action in which they are plaintiffs, claim in their own behalf that what they have authorized is a public nuisance (*Harris agt. Thompson*, 9 *Barbour*, 350; see *opinion of HAND, J.*, on pages 363, 364, 365, 366).

It is also urged, however, that the general public has, if the law is valid, lost the right to use the whole of Atlantic avenue as a street, as it existed at the time the act of 1876 was passed, and that such right of use constituted a property in the public, of which it is deprived without compensation, and for that reason such law is unconstitutional. That argument is equally unsound. The constitutional provisions do not reach public

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rights or public property. They were designed to protect individuals and not the state. It is a "*person*" who cannot be deprived "of * * * property without due process of law." Whenever all individual ownership of, or title in property has been extinguished, and its right for use by the general public acquired, there is no contract express or implied with any one, that the mode of use which was first adopted shall always continue to the exclusion of any other. If, for example, the fee of the land used for a street has become vested in a municipality for public uses, the legislature can regulate such use, and permit the enjoyment thereon of new and other modes of transit in addition to those first adopted (*People agt. Kerr*, 27 *N. Y.*, 188; see pages 192, 194, 195, 204; *Killinger agt. Forty-second street R. R. Co.*, 50 *N. Y.*, 206). And when property has been acquired for public use, there is no obligation to hold it for such a purpose, and it can by legislative permission be sold to private parties, "notwithstanding the fact that such abandonment and sale will lessen the value of surrounding property, which has been assessed for the benefit and advantage to it from the maintenance of such use. There is no contract in such cases with the owner of such adjacent property to maintain the use" (*The Brooklyn Park Commissioners agt. Armstrong*, 45 *N. Y.*, 234). These principles in no wise infringe upon that on which *Wager agt. Troy Union Railroad Company* (25 *N. Y.*, 526), was decided. It is not now held, that an easement acquired for the purposes of an ordinary highway will justify a railroad company in the occupation of such highway for railroad purposes, without compensation to the owners of the land. If any such cause of action, however, exists in any one's favor, he must enforce it for himself. The right, as against the original owners of the soil, to use Atlantic avenue for a railroad has, for the purposes of this action, been assumed, because if it does not exist, the remedy is not by this suit, and also because such right has been expressly adjudged to have been acquired (see cases cited in beginning of opinion); and a user under a claim thereof

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has been enjoyed so many years anterior to this action, that its discussion in a suit, which cannot remedy the alleged wrong, would be unprofitable. What is claimed is, that when as against the owners of the land, the right to operate a railroad has been acquired, the mode of such use, whether by steam or otherwise, is a matter within legislative control, and in regulating such use, no right of property is infringed upon, to which the above cited provisions from the federal and our state Constitutions are applicable.

It was also earnestly argued by the counsel of the plaintiffs that, by the action had under the act of 1859 and "the payment of the \$130,000, the public acquired the franchise for the public use that the railway companies theretofore had," and that now the public has an interest therein which the state cannot confer "upon these private corporations." Who the "public" are, which "acquire the franchise for the public use," we are not informed. If the city of Brooklyn was the acquirer, or a number of individuals so great that they can be called "the public," are the persons so styled, and are the successors to those rights, then it or they should enforce them. If the whole people are thereby intended, it is reasonably safe to say that the state can, through its legislature, bestow its property as it deems best for the public good, unless restrained by the fundamental law. The difficulty with the argument, however, is that there has been no *purchase or transfer* of a right at all, but simply the *extinguishment or surrender* of one. There was, as has been hereinbefore shown, no covenant nor agreement as to the future. If that was intended, such intention has never been expressed in a statute, nor embodied in any agreement, of which the plaintiffs or those for whose benefit this action is brought can avail themselves.

Second. But it is urged that the act is unconstitutional under section 18 of article 3 of the Constitution, which prohibits the legislature from passing "a private or local bill * * * granting to any corporation, association or individual the right to lay down railroad tracks;" or "granting to

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any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

To the objection based upon the former of these two prohibitions, it is answered: That the act of 1876 confers no "right to lay down railroad tracks." The privilege so to do was one already enjoyed by both defendants as already existing railroad corporations. The act simply gave legislative permission to use steam as a motive power on railroad tracks already constructed, the right to relay and repair which was an incident to the original grant. Very clearly, such a legislative permission to an existing corporation is not covered by the constitutional provision referred to (*Matter of P. P. and C. I. R. R. Co.*, 67 N. Y., 371). In *Hulburt agt. Banks* (52 How., 196) I had occasion to consider the same article of the Constitution, which was then invoked to enjoin the improvement of a part of an existing highway as an entrance or approach to a public park in the city of Albany, upon the ground, among others, that the law under which it was proposed to be done was one "laying out, opening, altering, working or discontinuing roads, highways or alleys," and therefore unconstitutional. The objection was overruled, and the conclusions then reached by me were sustained in the court of appeals (*People ex rel. Commissioners agt. Banks*, 67 N. Y., 568). Undoubtedly the language of that part of the Constitution, taking it in its literal sense, can be so construed as to prevent much useful legislation which it was not designed to reach; but it is, it seems to me, unsound reasoning to hold that the act of 1876 grants "the right to lay down railroad tracks," because the use of steam power made a firmer and stronger track necessary. That law did not confer any such right. Its existing franchise did not require a roadway upon which steam could not be used. The right to substitute heavy for light rails, a strong and compact road-bed for one of lesser strength, was an incident of its previously acquired rights—a privilege it already had, though perhaps it would never have been exercised unless the act had been passed to

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avail itself of which the previously unused right was called into action. What the defendants were doing when this action was commenced (strengthening their existing road-bed and rails) was not done because authorized by the law of 1876, but because such statute had made the change necessary if the privilege to use steam, thereby conferred, was to be enjoyed. It may be true that an act rendered necessary to be done by legislation, is one permitted; but when the right so to do exists, and legislation renders its exercise necessary; it cannot be argued that an original grant of power to do such act was by such subsequent legislation conferred.

The Matter of Brooklyn, Winfield and Newtown Railroad Company (75 N. Y., 335) has no application. The court held in that case, where a corporation had ceased to exist by lapse of time, that a statute which gave it new life under the pretense of enlarging the time for the performance of certain things which had been originally required, and by reason of not doing which it had forfeited its existence, was void, because, literally, it was by such act attempted to confer "the right to lay down railroad tracks." But neither that nor any decision to which my attention has been directed holds that some privilege may not, by a special act, be conferred upon a living corporate being, and so narrows legislative action, by a literal interpretation of the words of the Constitution as to make impossible relief which cannot be provided for by general laws, and against which the constitutional prohibition was not aimed.

The "exclusive privilege" or "franchise" which it is alleged the defendants obtain under the law, is not, by me at least, perceivable. The prohibition is to a grant which, *in words*, is exclusive. It may be true that conferring upon A. authority to do an act may practically prohibit B. from doing the same thing, because the latter may be unwilling to compete with the former; but so long as B. is left free to act, and nothing has been done which, if valid, would enable A. to

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enjoin B. because he (A.) has an exclusive right, the provision in the Constitution is not violated.

In conclusion it is proper to say, that if every argument used in behalf of the plaintiffs has not been discussed, that I see no principle whatever on which this action can be sustained. The defendants own a railroad franchise which they are enjoying in a way authorized by the public law of the state. If they are trespassers upon private property, they may be prosecuted by those who are injured. A minute and somewhat protracted examination and discussion of every point urged by the plaintiffs (though possibly some one in a printed brief of 100 pages may have been overlooked) leads me to the same conclusion which other judges (BLATCHFORD, GILBERT, NELSON and OSBORN) have reached, and that is, that not one is tenable. The defendants are, therefore, entitled to judgment, with costs.

SUPREME COURT.

THOMAS J. POPE, respondent, agt. THE TERRE HAUTE CAR AND MANUFACTURING COMPANY, appellants.

Foreign corporation — what is a sufficient service of summons to commence suit against — Code of Civil Procedure, sections 432, 1780.

Where plaintiffs, residents of this state, have a cause of action against defendants, a foreign corporation, arising upon the sale and delivery of personal property made by their brokers, a service upon the president of such corporation while passing through this state was sufficient to commence a suit, although his presence here had no relation whatever to the corporation or to his official duties, irrespective of the question whether or not the corporation has property within the state, or whether the cause of action arose therein.

First Department, General Term, March, 1881.

APPEAL from an order of special term denying motion to set aside the service of the summons in this action.

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Crane & Lockwood, for appellant, for the purposes of the motion.

Niles & Bagley, for respondent.

DAVIS, *P. J.*—It is not controverted that the plaintiffs have a cause of action against the defendants, arising upon the sale and delivery of property made by their brokers, nor that the plaintiffs are residents of this state and the defendants a foreign corporation.

Section 1780 of the present Code provides that an action against a foreign corporation may be maintained by a resident of this state for any cause of action. The provision, in this respect, is the same as that of section 427 of the former Code.

Section 432 of the present Code, among other modes, provides that personal service of the summons upon a foreign corporation may be made by delivering a copy within the state to the president of such corporation. In this case the summons was served by delivering a copy to the president of the defendant in the city of New York.

It appears that the president was not in the state upon any business of the corporation, or in any official capacity, but was passing through the state, with his family, on his way to a watering place in another state. The fact that he was the president of the corporation is conceded, as well as the actual personal service of the summons. The service is good under the Code, although his presence here had no relation whatever to the corporation or to his official duties.

Under the provisions of the present Code such service upon the president of a foreign corporation is a commencement of the action, irrespective of the question whether or not the corporation has property within the state, or whether the cause of action arose therein. These questions are important under the third subdivision of section 432 only, when no designation of a person for service has been made by the cor-

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poration, and the service is made upon the cashier, a director or the managing agent of the corporation.

It is not important to inquire what would be the effect of a judgment recovered upon the service of a summons in the form in which the service in this case was made, as that question does not arise at this stage of the proceedings. It may be that property will be found and attached in this state, or that sufficient property of the corporation will be found and levied upon to satisfy the execution. It is not necessary to anticipate those questions, because, under the provisions of the present Code, the service and the manner in which it was made in this case was sufficient to commence the suit.

The contract in the case was made with the defendants by Millard and Combs, who were brokers at St. Louis. The proposition of sale submitted by them in their letter of January 31, 1880, bears sufficient evidence on its face that they were not acting as principals, but on behalf of other parties, and the final sale, note or memorandum executed by them disclosed their principals. The acceptance of this sale note by the defendants, completed the contract between them and the plaintiffs. The iron was in process of importation and was sold for cash, to be delivered in bond in New Orleans. No place of payment is otherwise specified, and, as the delivery was made without payment, it is to be presumed that cash was to be paid within some time established by the usage on such sales. At all events, not having been paid or tendered on delivery, it was payable to the plaintiffs at their place of business, which was in the city of New York.

We do not deem it important, in determining this appeal, whether the contract was to be regarded as one made in this state, nor whether it should be held that the defendant's president came into the state for the transaction of business in making such contract. There was enough, we think, to give a right of action under the laws of this state against a foreign corporation to a resident of this state in the facts as they appear in the papers before us; and that action has been

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commenced in the form prescribed by the Code. These facts, under the present Code, disposed of the motion.

The order must, therefore, be affirmed, with ten dollars costs and the disbursements of the appeal.

BRADY, J., concurs.

SUPREME COURT.

THOMAS M. PETERS, as executor, &c., of SARAH A. RICHMOND, deceased, agt. EDGAR PORTER *et al.*

Will — construction of — Extrinsic proof to explain ambiguity.

The testatrix devised two lots and a gore "on the southerly side of Forty-ninth street, near Eighth avenue." Extrinsic evidence upon the trial of the action for construction of the will showed that testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street answering fully, in other respects, the terms of the devise. Extrinsic proof showed further that persons living above One Hundredth street drop the One Hundred and designate the lot by the remaining figures :

Held, that the devisee under the will takes the two lots in question.

It is entirely proper to resort to extrinsic proof to explain a latent ambiguity of this nature as to the subject of the devise, and to make clear the intention of the testatrix.

Special Term, December, 1880.

Samuel Riker, for plaintiff.

E. R. De Grose, for defendant.

William M. Purdy, for other defendants.

VAN VORST, J. — By the second clause of her will the testatrix, Sarah A. Richmond, devised "all and singular my two lots of land (or one lot and a gore, as it is sometimes called) situate on the southerly side of Forty-ninth street, near Eighth avenue, in the city of New York," to the defendant Edgar Porter on his attaining the age of twenty-five years.

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From the extrinsic evidence which I allowed to be introduced it appears that the testatrix owned no property on Forty-ninth street at the time of the execution of her will, or at the time of her death.

It also appears from like evidence that the testatrix, at the date of her will and at the time of her death, owned lands on One Hundred and Forty-ninth street, lying within one hundred feet of Eighth avenue; that in the deed to her such lands are described as two lots, and that the same premises are shown to consist of a lot and a gore. It also appears that persons living above One Hundredth street, in the city of New York, in speaking of property in streets above One Hundredth street, drop the One Hundred and designate the lot by the remaining figures. As an illustration, in speaking of lots on One Hundred and Forty-ninth street, they would designate them as on Forty-ninth street.

The testatrix, owning no lands on Forty-ninth, beyond doubt intended to devise to the defendant Edgar Porter her two lots on One Hundred and Forty-ninth street, which, in other respects, fully answer the terms of the devise, and it must be held that this defendant, under the will, takes the two lots in question.

It is entirely proper to resort to extrinsic proof to explain a latent ambiguity of this nature as to the subject of the devise, and to make clear the intention of the testatrix. The following cases, and others which might be named, establish the propriety of receiving such evidence under the facts and circumstances of this case: *Doe agt. Roe* (1 *Wend.*, 548); *Mann agt. Mann* (1 *John. Chy.*, 231); *Zole agt. Hardy* (6 *Cow.*, 341); *Lefevre agt. Lefevre* (59 *N. Y.*, 443); *Pritchard agt. Hicks* (273); *Lessee of Allen agt. Lyons* (2 *Wash. C. C.*, 475). There must be judgment adjudging a construction of the devise in accordance with the above conclusion, and that the defendant Edgar Porter takes, under the devise, the two lots on One Hundred and Forty-ninth street.

Wachtel agt. Noah Widows and Orphans' Benevolent Society.

COURT OF APPEALS.

ROSA WACHTEL, administratrix, &c., respondent, agt. THE
NOAH WIDOWS AND ORPHANS' BENEVOLENT SOCIETY,
appellants.

Benevolent society — Benefits — Expulsion of member.

AN association whose members become entitled to privileges or rights of property therein, cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity of being heard. The service of notice, in the absence of any agreement to the contrary or any provision in the charter or by-laws controlling the same, must be made personally.

Decided February, 1881.

APPEAL from an order of the general term of the court of common pleas, affirming a judgment entered upon the verdict of a jury in favor of the plaintiff for \$560, with interest and costs; the \$500 being a benefit or gratuity which the defendants agreed to pay upon the decease of a member in good standing upon their books, and the sixty dollars being a sum which they agreed to pay in addition thereto as funeral expenses, both sums being payable to the legal representatives of the deceased. The by-laws of the association were changed during the absence of the deceased from the city, and under these amendments the deceased, shortly before his decease, was expelled. No notice of the meetings at which the by-laws were amended or the deceased expelled were given, although an effort to make the service was made. The sufficiency of the efforts was, however, disputed. The defendants appealed to the court of appeals.

Abram J. Dittenhoeffer, for appellant.

F. Kurzman, for respondent.

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DANFORTH, J. — It is well settled that an association whose members become entitled to privileges or rights of property therein, cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity to be heard (*Ang. & Ames on Corp.*, sec. 420; *Bartlett agt. Med. Soc.*, 72 N. Y., 187; *Com. agt. Penn. Ben. Ins.*, 2 *Surg. & R.*, 141; *Innes agt. Wylie*, 1 C. & K., 257). This general rule of law is recognized by the defendant's by-law as applicable to one who, from any cause, should fail to pay his monthly contribution. It is in these words: "The financial secretary shall give to each member who is six months in arrears a written notice, calling his attention to the fact that he shall be stricken from the roll in case he does not pay his dues in thirty days." It is admitted that the deceased was in arrears, but it is established as a fact that the notice provided for in such a case was not given to him. It is said, however, by the learned counsel for the appellant that this omission was caused by the failure of the deceased to give notice to the association of his change of residence. It does not appear that he was under any obligation to do so. At the time he became a member of the society he notified it that his then place of residence was 41 First street, in the city of New York, but he subsequently removed to East Eighteenth street. There is nothing to show that the object of the information as to residence was to enable the defendant to serve its notices at that place, or that the deceased agreed that they might be left at his house. There are many other reasons why it would be well for such an association to know the residence of its members; but however that may be, the defendant, by another by-law, defined the penalty for neglect in giving notice of a change of residence. It declares that for such omission the member in default shall incur a fine of twenty-five cents. It would lead to an unjust result if there should be added to it a forfeiture of the whole benefit to which his representatives are, in case of his death, entitled. Such consequence is not declared and

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cannot be implied by any legal construction. In the absence of any agreement by the members, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, when the object is to deprive a party of his rights or property, or if that can be dispensed with, then in such other mode as will be most likely to effect its object. There then was no service, and the court has found that its omission is not excused. This conclusion is well warranted by the facts found, and the judgment should be affirmed.

All concur.

N. Y. COMMON PLEAS.

THE GROCERS' BANK, appellant, agt. RICHARD G. MURPHY,
respondent.

New York Stock Exchange — a seat therein is property and may be applied to satisfy a judgment against its owner.

A seat in the New York Stock Exchange is property that may be applied toward satisfaction of a judgment against its owner. Per BEACH, J. (VAN BRUNT, J., dissenting.)

General Term, March, 1881.

THE plaintiff recovered a judgment against the defendant on the 18th February, 1880, and execution was immediately issued to the sheriff of this county, where the defendant resides. Subsequently an order was granted, upon the usual affidavit, requiring the defendant to appear before one of the judges of this court to make discovery on oath concerning his property to be applied toward satisfaction of the judgment. This proceeding was taken under subdivision two of section 292 of the Code of Procedure. It appeared that the defendant owned a seat in the New York Stock Exchange. The

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motion was thereafter denied, and the appeal is by the plaintiff from the order.

Ten Broeck & Van Orden, for appellant.

Rastus S. Ransom, for respondent.

BEACH, J.—If the judgment debtor is alleged to have property which he unjustly refuses to apply towards the satisfaction of the judgment, the statute provides this mode of inquiry, and, upon the fact appearing, the judge may order it applied, if not exempt from execution and not earnings necessary for a family wholly or in part supported by the debtor's labor. If, therefore, the seat in the Stock Exchange is property, the plaintiff has a right to its application. The learned justice below held it was not; and his conclusion is supported by statements contained in opinions given by the courts of a sister state whose expressions are entitled to great respect. In *Thompson agt. Adams et al.* (*Weekly Notes of Cases*, vol. 7, No. 18) plaintiff claimed to be the equitable owner of the seat of a deceased member in the Philadelphia Stock Exchange, he having advanced the money for its purchase, the debt being unpaid. He therefore demanded the whole proceeds of sale, or to share equally with creditors who were members of the board. The court held the moneys applicable, first, in payment of indebtedness to members, which exhausted the fund. ELCOCK, J., before whom the case was tried, said: "A seat in the board is a species of property encumbered with conditions. It is not a matter of absolute purchase, for it never was freed from the conditions and duties of the constitution and by-laws." Upon appeal the court say: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members."

In *Pancoast agt. Gowen et al.*, garnishees (*Weekly Notes of Cases*, vol. 7, No. 29), the question before the court was whether or not the seat could be reached by an attachment

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execution, and it was held it could not be levied upon under that process or a *fi. fa.* The above cases are somewhat fully quoted to show that the question of the seat being property was not directly before the court for decision in either. The first related to the disposition of the proceeds of sale, and the second to the power of certain process to reach the property.

In *Ritterband* agt. *Baggett* (42 *Superior Court R.*, 556); *Hyde* agt. *Woods* (4 *Otto*, 524), and *In Matter of Ketcham, Bankrupt* (*Daily Register*, February 9, 1880), the point was clearly involved. These adjudications decide the seat to be property, and consequently applicable to debts. Justice CHOATE's opinion, *In re Ketcham* (*supra*), exhausts the subject, and little, if aught, can be added here. The learned court below suggests, as one reason for its conclusions, that the rights of membership, the privilege, seat or whatever else it may be termed, does not fall within any definition of property. This may be so, and still, if the modes of doing business in the present time have given rise to property rights bearing no similarity to those heretofore existing, and consequently undefined, the law under which the question at issue arises will still apply to them, if upon investigation they are found to possess qualities and characteristics common to recognized subdivisions of property. The controlling feature appurtenant to a seat in the Stock Exchange is that it may be bought and sold subject to the rules of the association, and in case of the owner's death a sale is made by the Exchange and the proceeds distributed. Herein exists the difference between it and membership of a social club. The latter can neither be bought nor sold. It has no general value or marketable quality. There is no provision for transfer, and nothing remains after a member's death. It is in itself but a purely personal right dependent upon election and terminated in every way by demise. There is but one condition common to both — the necessity for an election. In the former, one desiring membership and acceptable to the committee on admissions, pays money for the seat, which thereafter represents whatever

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sum was needful for its purchase. That amount is withdrawn from the assets of the purchaser, and, if the conclusion of the court below is correct, has been, without warrant of law, so changed in its character as to be relieved from the obligation resting upon all property, to wit, liability to creditors of its possessor. If such a result may be attained, the effort of active imagination cannot circumscribe the associations human ingenuity will produce to thus transmute veritable assets into intangible and yet most substantial and valuable shadows. Thus would follow the nullification of the legal principle which makes the debtor's possessions liable to his creditors, and honest claimants would be remediless because of the insufficiency of a statute enacted to facilitate the collection of just demands. There may be minor difficulties in the practical application of the statute, but these, in my opinion, are easily surmounted. Probably an order appointing a receiver, containing directions for the judgment debtor to do whatever may be deemed needful to transfer the seat under the rules of the Exchange, would accomplish the result sought. This, however, is properly within the province of the court below. The right existing, the law is sufficiently comprehensive and powerful for its enforcement.

The order must be reversed, with costs.

VAN BRUNT, *J.* (dissenting).—The opinion of the learned justice, by whom the question involved in this proceeding was determined at the special term, seems to me to demonstrate with a reasonable degree of certainty that membership in the New York Stock Exchange cannot be treated as property or a right to property, and that but little, if anything, can be added to the reasons assigned in that opinion for this conclusion which will add, in any material respect, to its conclusiveness. It seems to me that the difficulty which is encountered in the consideration of the proposition involved arises from the fact that under certain circumstances memberships of the stock exchange have realized the large sum of \$30,000, and

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that one is apt to be influenced in his consideration of the subject by the idea that a party should not be allowed to hold beyond the reach of his creditors that which had, under some circumstances, produced so large a sum of money. If membership in the New York Stock Exchange was worth merely a nominal amount, I think that we would have no difficulty in coming to the conclusion that it was a mere personal privilege and was not property or a right to property.

A brief consideration of the organization of the stock exchange seems to illustrate this proposition. The New York Stock Exchange is a voluntary association — not an incorporation — of a number of business men for the purpose of facilitating the transaction of their business. They have adopted a certain constitution and by-laws for the government of this association, and the relation which they bear to themselves and the outside world is that of a copartnership formed amongst a large body of men for certain specific purposes, and having the rights, privileges and duties of each copartner distinctly fixed by the articles of copartnership. By reason of this aggregation of men engaged in a particular business, and by reason of the facilities and securities which this combination affords to its members, the privilege of forming one of this copartnership or association becomes valuable. The copartnership, as such, owns no property and has no assets which could possibly be reached by any process of law. The sole thing which the defendant holds, and the sole right which he possesses, is his membership of this copartnership. I know of no principle of law which can possibly compel a debtor to assign to any person his naked right of membership in a firm. It is true that where the firm have property and assets, the interest of the debtor in such property and assets may be reached by the creditor; but his membership of the firm cannot be disturbed unless his copartners choose to dissolve the firm or to claim the firm dissolved by reason of the insolvency of one of the copartners, and then no right of partnership which the insolvent partner had in the firm could be possibly

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transferred to another, and yet this is precisely what is sought to be done by this proceeding. It is sought to transfer to some other party, by process of law, the membership of the defendant in this voluntary association.

It is urged that the constitution of the New York Stock Exchange contemplates the transfer of membership. Without any provision in the constitution or by-laws, undoubtedly any one member might transfer his membership to another, by and with the consent of all the members of the association, in the same manner as one partner might transfer his membership in the copartnership by and with the consent of his copartners; and in the constitution of the New York Stock Exchange there has been inserted a provision by which a member may, with the consent of a certain committee, transfer his membership instead of requiring, as they might have done, the assent of all the members of the stock exchange. The same could be done in articles of copartnership. A., B. and C. might enter into a copartnership by which either of the partners might sell out his membership in the concern, and introduce a new partner upon the consent of a majority of the firm, and such an agreement would be binding; and this is the sole privilege which is conferred by the constitution of the New York Stock Exchange upon its members.

There seems to be no way in which the court can enforce any process in reference to the transfer of the membership in the stock exchange.

It is true that the court may make an order that a member assign his membership, but an assignment of membership executed by a member does not transfer such membership; it requires something beyond that in order that such membership can or may be transferred; it requires the assent of the New York Stock Exchange in the manner approved by its constitution or articles of copartnership. The attempt might be made which would result perhaps in a destruction of the rights of the defendant, but no rights whatever can be conferred upon another person.

Firth *et al.* agt. Roe.

For these reasons, as well as for those so ably expressed by the learned judge in his opinion at special term, I am of the opinion that no creditor can reach this personal privilege of the defendant, and the order should be affirmed.

SUPREME COURT.

ELIZABETH FIRTH *et al.* agt. CHARLES A. ROE, GEORGE W. BERGEN and G. EDWARDS CARLL, individually and as formerly county treasurers of Queens county.

Demurrer to complaint—improper joinder of causes of action.

A joint action will not lie against three successive county treasurers to recover damages for alleged misinvestment and mismanagement of trust funds.

They are not co-trustees. Each is a trustee successively, and has no control over the other, and is liable for his own acts only. There could be no contribution between them.

Special Term, April, 1879.

THIS action was brought to recover damages for alleged misinvestment and mismanagement of trust funds.

The complaint alleged that in 1867 and 1868 certain moneys (\$8,953.60) were deposited with the county treasurer, the defendant Roe, to be invested, the income to be paid to Sarah E. Firth, the widow of one John Firth, to whom the property belonged, during her lifetime, as and for her dower, and at her death the principal to be paid to the plaintiffs, the children of decedent.

That the interest was paid said widow until her death, which occurred April 14, 1878.

That by order of this court, dated May 7, 1878, the county treasurer, the defendant Carll, was directed to pay the principal to the plaintiffs; and that in part performance of said order said Carll paid plaintiffs the sum of \$3,200, and has

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refused to pay the balance, and the sum of \$5,753 is now due and unpaid.

That of said sum of \$8,953.60, the sum of \$3,500 was invested by said Roe on a certain bond and mortgage. That at the time such investment was made the mortgage was not sufficient security. That he subsequently illegally and without consideration released a portion of the property from the lien of the mortgage.

That the defendant Bergen succeeded Roe as such treasurer, and that he allowed the investment to remain as it was, and also illegally and without consideration released another portion of the mortgaged premises.

That the defendant Carll succeeded Bergen as such treasurer, and also allowed such investment to remain as it was, and finally foreclosed the mortgage, without including the premises so released; and that he ought to have included the premises so released, such release being fraudulent, illegal and void.

That upon a sale under said foreclosure a loss occurred.

The complaint further alleges that of said sum of \$8,953.60, said Roe further invested the sum of \$2,513.60 on a certain other bond and mortgage; that the same were not sufficient security, and ought not to have been taken by him.

That his successor, the defendant Bergen, allowed such investment to remain as it was; and that his successor, Carll, also did the same, and finally foreclosed the mortgage at a sacrifice, and by his misappropriation of the proceeds of such foreclosure a still further loss ensued.

The defendants severally demurred to the complaint, on the ground of improper joinder of causes of action.

The case was submitted on briefs April 14, 1879.

Downing & Stanbrough, for defendants Roe and Carll.

Horace Secor, Jr., for defendant Bergen.

R. H. Bowne, attorney, and *Joshua M. Van Cott*, of counsel for plaintiffs.

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Mr. Secor, on the part of the defendants, cited Code, section 484; *Earle* agt. *Scott* (50 *How. Pr.*, 506); *Jackson* agt. *Brookins* (5 *Hun.*, 530); *Moremus* agt. *Crawford* (15 *id.*, 47); *Hess* agt. *Buffalo, &c., Co.* (29 *Barb.*, 391). The case of the *N. Y. and N. H. R. R. Co.* agt. *Schuyler* (17 *N. Y.*, 592) is not in point. There is no common right against these defendants. It is not an equity case, but a simple common-law action for damages for alleged negligent acts by each defendant. They are entitled to no relief—only to judgment for damages; and their prayer for equitable relief is nugatory (*Short* agt. *Barry*, 3 *Lans.*, 143; *Graves* agt. *Speir*, 58 *Barb.*, 349).

Judge Van Cott, for plaintiffs, claimed that the case was a clear one for contribution between trustees who were all delinquent. That it was a general principle in respect to parties in equity, to require all to be joined whose presence is necessary to a complete and final determination of the matters involved (*Story Eq. Pl.*, secs. 207-220; *Sherman* agt. *Parish*, 53 *N. Y.*, 483, 489, 490, *per* FOLGER, J.). "It is a general rule that one trustee shall not be liable for the acts or defaults of his co-trustee. This rule has its limits. * * * And if he were, when called upon to account, held chargeable, he should be afforded his remedies against his co-trustees and any third persons who have been accessory. * * * Hence it is that the first question arising is, whether the plaintiff is not in fault in bringing before the court all the parties necessary for a determination of the whole case, so as to protect the defendants as well as the plaintiffs. It is quite clear that if the defendant had been held to answer in the first instance to the plaintiff, he should have recompense from the estate of the active trustee, contributed from that of the co-trustee equally in fault, and be enabled to pursue and recover the fund in the securities in which it has been put, and in the hands of third parties receiving it with knowledge. It is convenient that those he may thus call upon

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should be parties in the action; thus multiplicity of suits is avoided. The evidence affecting him in favor of the plaintiff will have its legitimate effect against others, and so divers results in different actions be escaped, and one judgment in one action upon one hearing end all." The defendants were properly joined. There is a perfect unity of fund and identity of duty in respect of it, and a clear unity of liability for the waste of it. The order and proportion in which the defendants are chargeable, in equity, for their respective *devastavits* can properly be adjusted in one action, and the plaintiffs are not bound to incur the expense and risk of separate actions to adjust the order and proportion of their several liabilities (*Sherman* agt. *Parish*, *supra*; *see, also, Code, sec. 484, sub. 8, 9*; *Wiles* agt. *Suydam*, 64 *N. Y.*, 177; 17 *N. Y.*, 592).

Mr. Secor, in reply, insisted that *Sherman* agt. *Parish* was not applicable. That action was to compel defendant, who was one of several co-trustees, to invest \$18,000, and pay interest on same: *Held*, that to prevent multiplicity of suits co-trustees should be joined, and the question of contribution as between such co-trustees could be determined. We were not co-trustees. Each was a trustee successively and had no control over the other, and is liable for his own acts only. There could be no contribution between them. "It is the principle of courts of equity, in cases of breach of trust, * * * and when the facts of the case call for a contribution or a recovery over that all persons who should be before the court, to enable it to make complete and final judgment, are necessary parties" (*Sherman* agt. *Parish*, *supra*, *relied on by plaintiffs*). As before seen, in our case, there can be no "call for a contribution."

BARNARD, P. J., to whom the case was submitted, gave judgment to the defendants, with costs, on May 9, 1879. No appeal was taken.

First National Bank agt. Fourth National Bank.

COURT OF APPEALS.

FIRST NATIONAL BANK OF MEADVILLE, PENN., appellant, agt.
FOURTH NATIONAL BANK OF NEW YORK, respondent.

Costs on appeal — to be given to the party ultimately successful.

Where a judgment is reversed "with costs to abide the event," and the order is silent as to which party is to receive the costs, it means that they are to go to the one ultimately successful.

Decided March, 1881.

THIS action was first tried before a referee, and from the judgment in favor of the plaintiff, entered upon the referee's report, the defendant appealed to the general term of the supreme court of the first department, which affirmed the judgment with costs. The defendant then appealed to the court of appeals, and a new trial was ordered (*see* 77 *N. Y.*, 320), with "costs to abide the event." Upon the second trial the plaintiff again succeeded. The clerk taxed the costs of the first trial and of the appeals in favor of the plaintiff. Upon appeal from this taxation the court at special term, following the interpretation of said phrase adopted in *Sheridan agt. Genet* (*Daily Register*, December 12, 1878), and followed in *Union Trust Co. agt. Whiton* (17 *Hun*, 593), reversed the clerk and struck out the costs of the former trial and of the appeals. Upon the appeal taken from said order, the general term affirmed the order of the special term, and the plaintiff appealed to the court of appeals. That court has now settled the question in the following opinion.

ANDREWS, *J.* — The plaintiff is entitled to tax the costs of the appeal to this court. The first judgment was reversed, with costs to abide the event. The event of the new trial was the circumstance which was to determine which party

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should recover the costs of the appeal. The order did not limit the recovery of costs to the prevailing party on the appeal in case he should finally succeed in the action.

Appeals are often taken for technical errors which do not affect the merits, and although the appellant is successful, the effect of such appeals in many cases is simply to protract and increase the expense of the litigation. There is generally no injustice in awarding costs on the appeal to the party who shall finally recover.

It is contended that the plaintiff is entitled to tax the costs of both trials; and this is the undoubted practice, although the first judgment in his favor was erroneous. In analogy he should be allowed to tax the costs of the appeal. The terms on which a new trial is granted, as respects costs, are within the discretion of the court. We have often limited the recovery of costs on appeal to one of the parties, but where the order reversing a judgment and granting a new trial is made, with costs to abide the event, without other limitation, we understand that the party finally succeeding in the action is entitled to tax them. This construction was put upon a similar order in *Koon* agt. *Thurman* (2 *Hill*, 357). In *Union Trust Co.* agt. *Whiton* (78 *N. Y.*, 491) we refused to interfere with the construction given by the general term of the first department to its own order. The question here is as to the construction of our order.

The order of the special and general terms should be reversed, and the taxation by the clerk should be affirmed.

All concur, except RAPALLO, J., absent.

Fleishhauer agt. Doellner.

SUPREME COURT.

MARCUS FLEISHHAUER agt. JOHN F. DOELLNER and others.

Mortgage—Decree of sale permitting purchaser to retain out of purchase money the amount of taxes—Motion to deduct amount of taxes from judgment for deficiency should have been made before sale—Party assuming payment of bond and mortgage becomes principal debtor and is bound to see that the taxes are paid.

The mortgage in suit, which contains no covenant to pay taxes, was executed by defendant Doellner in 1872. He sold the premises in 1873 to defendant Guggenheimer, who assumed payment of the mortgage. In 1874, Guggenheimer sold the property subject to the mortgage. The judgment of foreclosure permitted the purchaser to retain out of the purchase money the amount of all taxes and assessments which, at the time of the sale, were a lien on the premises, and \$578 were deducted to discharge taxes due upon the premises for 1877 and 1878:

Held, that a motion by Guggenheimer to deduct the \$578 from the judgment against him for deficiency, comes too late after sale under the decree; and that at any rate Guggenheimer was liable for the deficiency after deducting such taxes from the purchaser's bid.

Special Term, January, 1881.

MOTION to amend a judgment.

Mr. Guggenheimer, for motion.

Mr. Lawrence, opposed.

VAN VORST, J.—I am of opinion that the motion comes too late. The mortgaged premises have been sold under the decree and in pursuance of its directions, and the moneys applied according to its terms. The taxes were deducted from the bid of the purchaser as the judgment directed.

If there was anything wrong in the judgment, relief should have been asked before the sale was made following its terms. But were it otherwise, I think the defendant Guggenheimer

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was legally and equitably liable for the deficiency after deducting the taxes from the purchaser's bid. Guggenheimer, by assuming the payment of the bond and mortgage, became the principal debtor, and it was his business to see that the taxes were paid.

The mortgagee is entitled to the amount of his mortgage, and he cannot be injured through the accumulation of taxes growing out of the default of those whose duty it was to see that they were paid.

While Guggenheimer covenanted to pay the bond and mortgage, and thereby became the principal debtor, he conveyed the premises without exacting a similar covenant from his grantee, so he continued to remain personally chargeable for the payment of the bond and mortgage.

The Mutual Life Insurance Co. agt. *Davis* (44 *Superior Ct. R.*, 173) and *Marshall* agt. *Davis* (78 *N. Y.*, 414) are adverse to the contention of the defendant, and his motion is denied, with ten dollars costs.

N. Y. MARINE COURT.

JOSEPH J. KELLY agt. EDWARD C. SHEEHY *et al.*

Forcible entry and detainer proceedings under the Code of Civil Procedure — The questions to be litigated therein — Code of Civil Procedure, sections 2233, 2234, 2235, 2245, 2247.

In proceedings for forcible entry and detainer under title 2 of chapter 17 of the Code of Civil Procedure, the main question for determination is whether the party charged entered by force upon one, having previously a peaceable possession, under claim of right, and whether the person whose possession was invaded has been held out by force. These provisions do not cast upon the magistrate the burden of examining and determining conflicting titles to real estate.

Special Term, March, 1881.

Kelly agt. Sheehy *et al.*

PROCEEDINGS for forcible entry and detainer were instituted under the new Code to recover the possession of two valuable lots of land on Fifth avenue, near Ninetieth street, in the city of New York, with the buildings thereon erected.

John Townsend, for complainant.

James W. Gerard, James Henderson and Mathew Daly, for defendants.

McADAM, J.— This is a proceeding commenced under title 2 of chapter 17 of the Code of Civil Procedure, section 2233 of which provides that no entry shall be made into real property but in a case where entry is given by law, and in such a case only in a peaceable manner — not with strong hand, nor with multitude of people — and declares that a person who makes a forcible entry, forbidden by said section, or who, having peaceably entered upon real property, holds the possession thereof by force, may be removed therefrom as prescribed in said title.

Section 2234 enumerates, among the officers who are charged with the exercise of this jurisdiction, the justices of the marine court of the city of New York. Section 2235 provides how the application shall be made and what the petition shall contain.

Section 2245 provides that where the application is founded upon an allegation of forcible entry or forcibly holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property at the time of a forcible entry, or in constructive possession at the time of a forcible holding out, and requires that the adverse party either deny the forcible entry or forcible holding out, or that he allege in his defense that he or his ancestor, or those whose interest he claims, had been in quiet possession of the property for three years together next before the alleged forcible entry or detainer, and that his interest is not ended at the time of the trial.

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The issues thus joined must (unless a jury be demanded) be tried by the justice entertaining the proceeding (*sec.* 2247, *supra*). I have given the substance of these various provisions because they differ in some respects from the mode of procedure laid down in the Revised Statutes (3 *R. S.* [6th ed.], 820), and are intended as a substitute therefor. The defendants Patrick Sheehy and Cornelius Lynch have interposed a general denial, while the principal defendant Edward C. Sheehy, after denying the forcible entry and detainer, admits that he is in possession of the property claimed, and alleges that his possession is by virtue of a lease thereof, executed to him by Olivia G. Ranney, Julia Scott and Francis Scott, whom he asserts to be the owners in fee of said premises, with the right to control the possession thereof. The issues presented are to be tried in the manner provided by section 2245 (*supra*), which is similar to section 11 of the former act (3 *R. S.* [6th ed.], 821). This provision, the courts have held, did not cast upon the magistrate the burden of examining and determining conflicting titles to real estate (*People agt. Leonard*, 11 *Johns.*, 504; *Carter agt. Newhold*, 7 *How. Pr.*, 166; 1 *Daly*, 46). . Adopting this as the correct interpretation of section 2245 (*supra*), and as a guide to what the magistrate is to try, it follows that the main question for determination in proceedings of this character is whether the party charged entered by force upon one, having previously a peaceable possession, under claim of right, and whether the person whose possession was invaded has been held out by force (*Wells agt. De Leyer*, 1 *Daly*, 46), for no one has the right to assert his own title with force and violence against another in peaceable possession under color of title and claim of right (*Rex agt. Wilson*, 8 *T. R.*, 357, 361, and cases cited in note 9 to *Bishop's Cr. Law*, *sec.* 475).

The complainant introduced upon the trial a paper title to the premises, from the time the title to the Harlem commons was, by law (1820, 1823), vested in trustees for sale, down to the present day, which at least proved that his occupation was

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not a bare possession without title; but under color of title and claim of right, and being peaceable in its character, it should have been assailed by appropriate legal proceedings or not at all. In addition to the paper title under which he holds, the complainant has regularly paid all the taxes, assessments and other charges upon the property for many years past, and has in every way asserted and maintained his claim of title to the property. When the defendant Edward C. Sheehy took the lease from Olivia G. Ranney and others, in May, 1880, he knew that the complainant had possession of the property under a title adverse (if not superior) to that claimed by his lessors, and must have known that possession would not be quietly yielded by the complainant to one who came with hostile intentions. The lease was not produced upon the trial and is said to be lost. The term was one year, and the rental \$100 for the term. No effort was made to enter under it until Sunday morning, the 28th of November, 1880, over six months after the term demised commenced.

The fact that the complainant's possession made his title impregnable against attack from any source except by one having superior title of an invulnerable nature, makes it apparent that the complainant would not have welcomed an adverse claimant to the protecting ægis of his possession, when he must have known that he was surrendering to an enemy nine-tenth of the struggle in a prospective possessory common-law action of ejectment, where the plaintiff cannot litigate the inherent weakness of the defendant's title, but must rely solely upon the invulnerability of his own. The complainant naturally resisted the attempt to take possession, and yielded only after making the best resistance he could against an unexpected assault by superior numbers. The time and manner of taking possession were unlawful, and in clear violation of the statute. I need not cite authorities to sustain this conclusion, because it would be impossible to find anything in the annals of jurisprudence which sanctions a forcible

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entry as a mode of possessing the property of another, even under adverse claim of title. The possession thus obtained is maintained and insisted upon and constitutes a forcible holding out, which the provisions of the Code I have cited were intended to redress. No injustice is done by restoring the complainant to the possession of which he is wrongfully deprived. The parties are merely returned to the position they occupied when the possession was wrongfully invaded on the Sunday morning in question. If the defendant Edward C. Sheehy, or those under whom he claims, have any title to the property in dispute, they may assert it in some appropriate mode by legal proceedings, but they must not take the law into their own hands and decide disputed questions of possession by acts or menaces of physical power.

The complainant's counsel, upon the trial, for some reason of his own, elected to rely upon the forcible holding out, from which it may be inferred that he abandoned the forcible entry as a ground of recovery. This he had a right to do (*People agt. Anthony*, 4 *Johns.*, 198; *Same agt. Richett*, 8 *Cow.*, 226; *Same agt. Godfrey*, 1 *Hall*, 240; *Same agt. Field*, 1 *Lans.*, 232; *S. C.*, 52 *Barb.*, 216), for the forcible detainer is a mere continuation of the first offense. The proof of the entire transaction is in evidence, however, and characterizes the holding out complained of. Patrick Sheehy and Cornelius Lynch disclaim any forcible holding out, and as to them the proceeding will be dismissed. Edward C. Sheehy insists upon the right to maintain the possession acquired in the manner before stated, and as to him a final order will be made, awarding to the complainant the possession thus wrongfully withheld. Under section 2250 (*supra*), the complainant will be awarded twenty-five dollars costs, and the defendants Patrick Sheehy and Cornelius Lynch will each be awarded twelve dollars and fifty cents costs. The disbursements actually incurred are to be added to these amounts. The technical point made in regard to section 2233 (*supra*) is without force

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for two reasons: First. The petition filed clearly gives the court jurisdiction, which is not divested by the phraseology of that section. Second. The proper interpretation of section 2233 is that the proceeding for forcibly holding out may be maintained, not only in cases of forcible entry, but in cases where one "peaceably enters upon real property," without right, and "holds the possession thereof by force." In this case the entry was forcible and without right, and *a fortiori* the section applies.

The final order in accordance herewith, together with the warrant, must be drawn and submitted to me for my fiat.

COURT OF APPEALS.

THE PEOPLE *ex rel.* FRANCIS HIGGINS, receiver, &c., respondent,
agt. DAVID McADAM, justice, &c., appellant.

Summary proceedings—Jurisdiction of the marine court—The terms "landlord" and "tenant" construed—Leasehold estates defined—Judgment liens thereon.

Summary proceedings under the statute founded on an execution sale may be maintained against the judgment debtor personally, or against any person in possession under him subsequent to the lien of the judgment (*Reversing S. C., ante, 139, and 58 How., 442*).

Decided March, 1881.

APPEAL from a judgment entered on an order of the general term of the supreme court of the first department, affirming an order of the special term granting a perpetual writ of prohibition enjoining Mr. justice McADAM from continuing a summary proceeding against one Virginia Herring, founded upon an execution sale against the executors of the estate of

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the late judge McCUNN. Upon the return of the summons it was objected that justice McADAM had no jurisdiction because the proceeding (which was commenced before the present sections 2231-2265 of the Code of Civil Procedure went into operation) would lie against the execution debtors only, and not against those who entered under them subsequent to the sale. This objection was overruled by Mr. justice McADAM, and the matter ordered to proceed at a time then designated. Before the adjourned day Francis Higgins, the receiver of the McCunn estate (who succeeded the executors thereof) procured the alternative writ of prohibition, which was, after argument, made absolute by Mr. justice BEACH, sitting in the supreme court, special term (*opinion of the special term judge*, 58 *How. Pr.*, 442). Upon an appeal therefrom, the order was affirmed at the general term (*opinion reported*, 22 *Hun*, 559; 60 *How. Pr.*, 139; 11 *Weekly Dig.*, 112) and from the judgment entered on such affirmance, the defendant (justice McADAM) appealed to the court of appeals.

Edward Jacobs and *Alfred McIntyre*, for appellant.

A. H. Joline, for respondent.

FOLGER, *Ch. J.*—Section 28, article 2, title 10, chapter 8, part 3 of the Revised Statutes (*vol. 2, page 512*) provides that any tenant of premises may be removed therefrom, if they live in the city of New York, by any justice of the marine court. The statutes, in subsequent sections, prescribe the manner in which the removal may be made. There is no question in this case, but that the proceedings had before justice McADAM were formally in accordance with the statute. The defendant in them, Virginia Herring, was the tenant of the premises, and they lay in New York city. So far, it seems that the justice of the marine court had jurisdiction. But the 28th section (*supra*), in four subdivisions, limits the general

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character of its first declaration, and therein designates the particular cases in which the power to remove may be exercised. The case in hand, if it meets either of those, meets the fourth. That is for the case of a person holding over and continuing in possession of real estate, which shall have been sold by virtue of an execution against such person after a title under such sale shall have been perfected. In the case before us there has been a sale of the premises of which Herring is in possession; the sale was by virtue of an execution, and the title under the sale has been perfected. The execution, however, was not against her. She is not literally the person against whom the execution was issued. If the provisions of the fourth subdivision are to be strictly applied, she is not amenable to them. There have been, however, judicial interpretations of it, which have declared that it may be applied liberally; thus, it has been held, that the proceedings may be had against the tenant of the person against whom the execution issued (*Birdsall agt. Phillips*, 17 *Wend.*, 464); that the conventional relation of landlord and tenant need not exist between the purchaser at the sheriff's sale and the occupant of the premises, arising from a lease or a compact between them; that the purchaser takes all the rights of the landlord; that there does thereupon arise between the purchaser and the tenant the relation of landlord and tenant; that the statute does not mean a holding over by his own personal act, but that if he do it by agent, servant or tenant at will, he may equally be said to hold over; that the statute is equally applicable to the judgment debtor and all who hold under him under pretense of title acquired posterior to the judgment. In *Hallenbeck agt. Garner* (20 *Wend.*, 22) the authority of 17 *Wendell* (*supra*) is recognized, and that a servant, or agent, or one entering upon the premises under title derived subsequent to the lien of the judgment under which the sale has been made, is amenable to the statute. And in *Spraker agt. Cook* (16 *N. Y.*, 567) it is declared that by this statute the legislature has applied the designation of tenant to the judg-

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ment debtor in possession, and that of landlord to the purchaser of the land on execution, without discriminating between such parties and those who are properly landlords and tenants. It seems, then, that Herring, though not the person against whom the execution issued, is liable to proceedings under the statute, if she has entered upon the premises under pretense of title thereto, acquired subsequent to the lien of the judgment. And the dates furnished by the case show that she did. The debtor died in 1872, leaving a leasehold interest for years in the premises not yet at an end. In December of that year executors of his will qualified and received letters testamentary, and went into possession of the premises as owners of the leasehold estate. In 1875, one Parker, a creditor, recovered a judgment against those executors and docketed it. In March, 1876, a receiver of the estate was appointed in proceedings by the executors for a construction of the will, and in proceedings for a partition of the leasehold estate. In May of that year, by order of the surrogate therefor, Parker issued an execution against the executors, judgment debtors in his judgment, and thereupon, in September of that year, issued an execution which the supreme court ordered to be levied upon any of the assets or property of the testators in the hands of the executors, the judgment debtors. In 1877, the sheriff, by virtue of the execution and a levy under it on the leasehold estate, sold that estate and gave a certificate to the purchaser. In 1878, at the expiration of fifteen months from the sale, the sheriff gave a deed to the purchaser, who is the same one who has taken these proceedings to remove Herring. In 1879, the receiver leased the premises to Herring, and she went into possession by authority of the lease, and under the title of the receiver. Thus, it appears that the possession of Herring is by the title of the receiver, and that his title was acquired posterior to the judgment. She is within the provisions of the statute, as interpreted by the adjudications that we have cited. The execution was not against her nor against the receiver who let to her.

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But it was against the executors. The receiver had no greater or other title than that of the executors, and no right to let, save what he got by acquiring their title. It was either under their title that Herring held, and that was a title subject to the lien of the judgment, and swept away by a sale under execution thereon and a perfecting of the sale thereon by taking the sheriff's deed; or it was under the title of the receiver, which was a title posterior to the lien of the judgment and equally swept away. The receiver did not take strictly under the executors, but he took only their right and title; he took not as their agent or servant, but he took as representing their testator in part, and those interested in the testator's estate in part. *Spraker agt. Cook (supra)* shows that an exact meaning is not to be given to the terms landlord and tenant, in applying the fourth subdivision of the twenty-eighth section; that the purchaser is a landlord, and that any one in possession under the title that the purchaser has acquired is a tenant within its scope. We perceive that the interest in real estate affected by the proceedings is a leasehold for a term of years. Such an interest was at common law personal property, but the statutes of this state have for some purposes modified its character. Estates for years are by those statutes denominated estates in lands. They are still chattels real, and are not classed as real estate in the chapter of the Revised Statutes of "title to property by descent." A judgment binds and is a charge upon the chattels real of every person against whom the judgment is rendered. We will not say that estates for years in the hands of executors are thus bound and charged, when they have acquired them as the property of their testator, though the judgment be against the executors. For leases for years of a decedent go to his executor or administrator as assets for distribution, and vest in him as part of the decedent's personal property (*Despard agt. Churchill*, 53 *N. Y.*, 199, and citations there made). It may be that there is a conflict in the statutes on this subject, when it is sought to apply them all at once to

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such a state of facts as has arisen in this case. If there be, it is not needed that we seek to allay it now. The creditor recovered and docketed his judgment against the executors before the appointment of a receiver. The receiver was appointed by the supreme court. He was not appointed on the application of creditors. His duty was to receive rents and profits and collect personal estate, and to make deposits with a trust company. He stood in the place and stead of the executors for the benefit of those in anywise interested in the estate of the testator. He was not in hostility to the judgment creditor. When the creditor had, by an order duly made by the surrogate, issued his execution to the sheriff, commanding him to collect it out of the assets and personal property in the hands of the executors at the time when the judgment was docketed, the supreme court then gave leave that the execution be levied and enforced upon any assets or property in the hands or under the control or possession of the receiver, or of the executors, which were of or belonging to the testator. This order, made by the same court which had appointed the receiver, justified the levy upon this leasehold estate, and when the levy was after that made, established it as a binding charge upon that estate as fully as the judgment could have been, had it been rendered against the testator. It did more than that; in effect, it made it an execution, not only against the defendants named in the judgment, but against the receiver also. He was by the operation of the order, though not in terms, yet in substance, the person against whom the execution was issued. The levy and sale under it, and the perfecting of the sale, took place before the lease by the receiver to Herring. Thus, her possession was taken under a title that was subordinate to, or extinguished by, the judgment, execution and order, sale and deed. We see no reason why the facts do not bring the case within the principle of the adjudications that we have cited. If so, the justice of the marine court had jurisdiction of the subject-matter, of the per-

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sons and of the case, and should not have been prohibited from exercising it. The judgment appealed from should be reversed.

All concur.

N. Y. COMMON PLEAS.

MAX SCHLOSSBERG agt. PHILIP LAHR.

Negligence — Parent and child.

A parent is not liable for the trespasses or negligence of an infant child.

Special Term, March, 1881.

Samuel J. Cahn, for plaintiff

Frank R. Lawrence, for defendant.

VAN BRUNT, J. — The complainant in this action seeks to recover damages of the defendant for the negligence of his infant child. The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff cites as an authority to sustain the cause of action mentioned in his complaint, the case of *Patterson* agt. *Harrington* (11 *Pittsburgh Legal Journal*, 346). I have been unable to examine that case, but if it holds all that is claimed for it by the plaintiff, as it seems to be contrary to the current of decisions in this state, it cannot prevail as an authority. The case of *Tift* agt. *Tift*, (4 *Denis*, 175) is cited by the defendant as an authority to sustain his demurrer. The court held in that case the father was not liable for the willful act of his minor daughter. In the case of *Bullett* agt. *Babcock* (3 *Wend.* 291) it was held that infants are liable in

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the same manner as adults for trespass and assault; and the facts in that case established the rule that an injury to another by the negligence of an infant, renders the infant liable to an action for damages. There is no case in the courts of this state which holds that both the infant and the parent are liable for the trespasses of a minor child, and reasoning by analogy, the case of *Tift* agt. *Tift*, above cited, is an authority to the contrary.

In *McPherson on Infants* (page 496), the cases in which an adult is liable for the trespasses of an infant are limited to those in which the injury is done by the infant, without malice, through the negligence of the adult.

The demurrer must be sustained.

SUPREME COURT.

DARIUS MILLER and JOHN MILLER agt. ELMORE A. KENT and
ABRAM POOLE.

Removal of causes into United States courts—Chap. 137 of 1875 (United States statutes)—when motion too late—All the defendants or all the plaintiffs must be citizens of different states.

Under the provisions of the act of congress (*chap. 137 of 1875*), providing for the removal of causes into the United States courts, "before or at the term at which said cause could be first tried, and before the trial thereof," it is too late to make such application after a demurrer has been interposed and duly argued and decided.

In all the states there is, by law or rule, a term, *i. e.*, a term at which a cause may for the first time be called for trial. This is the term at which, within the meaning of the law, the cause could first be tried, and, therefore, is the term at or before which the petition for the removal must be filed.

All the persons constituting "the party" on one side must be citizens of different states from those on the other side.

To warrant a removal under the provisions of the act of 1875, covering

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suits between citizens of different States, *if any person who is a necessary plaintiff and any person who is a necessary defendant are citizens of the same state, there is no right of removal.* All the defendants compose the "party" who may ask for a removal, and they must all be other states' citizens.

The averments of the petition are not conclusive on the state courts. The court has the power and the right to examine other papers than the mere affidavit of the petitioner, to ascertain whether the statute permitting the removal of the cause has been complied with

At Chambers, February, 1881.

L. A. Gould, for motion.

L. S. Bennett and *Adolphus D. Pape*, opposed, made and argued the following points:

I. This court has the power and the right to examine other papers than the mere affidavit of the petitioner to ascertain whether the statute permitting the removal of this case has been complied with. "The mere filing of the papers on an application for the removal of a cause to the United States court does not have the effect of removing the action. The court must act upon them either by order or by accepting the sureties offered" (*Vose* agt. *Yulee*, 4 *Hun*, 628). The averments of the petitioner are not binding on the court (*Clarke* agt. *Opdyke*, 10 *Hun*, 383).

II. It appears that *Nathan G. Miller*, one of the plaintiffs, is a resident and citizen of the state of New York. It is admitted that *Elmore A. Kent* is a resident and citizen of the same state. To warrant a removal under the provisions of the act of 1875, covering suits between citizens of different states, if any person who is a necessary plaintiff and any person who is a necessary defendant are citizens of the same state, there is no right of removal. All the defendants compose the "party" who may ask for a removal, and they must all be other state citizens (2 *Circ.* [*N. Y.*], 1878; *Sawyer* agt. *Switzerland Mar. Ins. Co.*, 14 *Blatchford*, 451; *Van Brunt* agt. *Corbin*, *id.*, 496; *S. P.*, 6 *Circ.* [*Mich.*], 1878; *Re Fraser*,

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18 *Alb. L. J.*, 353; 25 *Int. Rev. Rec.*, 226; 6 *Reporter*, 357.) Abram Poole does not unite in the petition. He is a necessary party defendant. He appeared in this action and serves an answer (*See Bennett's affidavit*). Judge BLATCHFORD, in *Chicago, St. Louis Railroad Company agt. McComb* (*U. S. Circ.*, Dec. 31, 1879; 9 *Rep.*, 569), says: "There must be in the suit a controversy between citizens of different states, and all the parties on one side of such controversy must unite in the petition for removal, and when they so unite they must all of them be at the time of different states' citizenship from any of the parties on the other side of such controversy;" also, in *Burke agt. Flood* (*U. S. Circ. Court [California]*, Jan. 26, 1880; 9 *Reporter*, 501), SAWYER, J., says: "I regard it as settled that to remove a case under that provision, it is necessary that all of the persons constituting the party on one side of the controversy must be citizens of different states from the party on the other. The cause is not removable." So, whether Poole is in or out of the case, it appears that Kent is a citizen of New York and N. G. Miller, a party on the other side, is also a citizen of New York. In the cases of *Wormser agt. Dahlman, Kline & Roth* (57 *How.*, 287), Judge BLATCHFORD says: "It is plain that the proceedings for removal were taken not under the act of March 3, 1875 (18 *U. S. Stat. at Large*, 470), but under the second subdivision of section 639 of the Revised Statutes, which is a re-enactment of the provisions of the act of July 27, 1866 (14 *U. S. Stat. at Large*, 306). Under the act of 1875 nothing less than the whole suit can be removed into this court. Under the act of 1866, and subdivision 2 of section 639 of the Revised Statutes, the suit may be removed only as against the defendant who petitions to have it removed only as against him."

III. The petition is made too late, because a demurrer has been three times interposed by the defendant Kent, all of which have been duly argued and decided. Judge LAWRENCE, in *Bright agt. Milwaukee R. R. Co.* (1 *Abb. N. C.*, 15) in construing the act of 1875, says: "A hearing on the

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demurrer was actually noticed and the demurrer sustained. * * * The default on the demurrer was a trial as to the demurring defendants." In the opinion embodying this decision he quotes *Warner agt. Penn. R. R. Co.* (6 *Hun*, 197); *Place agt. B. W., &c., M. Co.* (28 *How. Pr.*, 185). It is apparent from the affidavit of H. S. Bennett, that this case "could have been tried" previous to the filing of this petition. The statute does not contemplate any delay for the purpose of settling the pleadings in the state court. These can be settled, if necessary, after removal (*U. S. Circ. [W. B. Missouri]*, June, 1880; *Murray agt. Holden*, 10 *Reporter*, 162). Judge McCrary in that case (*on page 162, volume 10 of Reporter*), says: "One of the objects of the act of 1875, was to prevent the abuses which had been practiced under the acts of 1866 and 1867, which allows a removal at any time before the final hearing. It was evidently the purpose of congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the state court until satisfied that he would fail there, and then change his forum. In all the states there is by law or rule a term, *i. e.*, a term at which a cause may for the first time be called for trial. In practice but few contested cases are tried at the first term, and it often happens that controversies arise upon questions of pleadings, so that as in this case, no issues of fact are joined at that term. It is nevertheless the term at which within the meaning of the law such cases could first be tried, and, therefore, is the term at or before which the petition for removal must be filed. The statute does not contemplate any delay for the purpose of settling the pleadings in the state court. These can be settled in the federal court after removal if necessary." Judge Blatchford, in *Forrest Home agt. Keeler* (9 *Reporter*, 432), says: "The intent of the act of 1875, is plainly to require prompt action on the part of one desiring removal." "The want of preparation of the parties does not affect the question." Judge Dillon, in *Atlee agt. Potter* (4 *Dill.*, 562), says: "It has also the merit of preventing a party from

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experimenting with the state court by demurrers and motions, with a view to remain if the outlook is favorable or to apply for a removal if that is more hopeful."

Ch. J. WAITE, in removal cases (10 *Otto*, 473), says: "We think it clear that congress did not intend by the expression 'before trial,' to allow a party to experiment his case in the state court, and if he meet with unexpected difficulties, to stop there and take his suit to another tribunal." Justice DANIELS, in *Warner agt. Penn. R. R. Co.* (6 *Hun*, 199), says: "Any other construction would allow the applicants to delay until all the preparations of his adversary had been made for trial and the trial itself should be about to be commenced, and in that way subject him to a compulsory postponement which might involve him in the inability afterwards to establish a meritorious cause of action." Applying the reasoning and decisions in the foregoing cases to the facts of this case, it is clear that the petition is filed too late. This cause was at issue (by an answer of both defendants) more than one year ago. It "could have been tried" more than a year ago upon the issues then raised. Since that eight terms have passed. During those eight terms the petitioner has been "experimenting" with the state court by interposing three demurrers, serving three answers, and is now under an order of the court requiring him to serve a fourth answer. *In not one of his demurrers has he prevailed.* Three of his demurrers have been overruled, and two of his answers have been judicially declared "indefinite and uncertain" and "purposely" so. After securing the delay caused by these proceedings and having "experimented" far enough in this litigation to obtain the opinions of several judges of the supreme court upon his case, he, in the language of judge DILLON, before cited, has decided to "apply for a removal as that court offers more hopeful prospect."

IV. The application for removal should be denied.

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BARRETT, J. — The motion to remove this action to the United States court should be denied, for two reasons: First, it is too late; second, the plaintiffs and defendants respectively are not all citizens of different states. (1.) It is too late because the issues not only could, but actually have been, tried. There is no limitation in the statute to issues of fact. There were here several trials of issues of law, and final judgment might have been rendered thereon. Leave to answer, even though usual, is in theory of discretion. Congress did not intend to permit a removal after such experiments in the state courts (*Murray* agt. *Holden*, 10 *Rep.*, 162; *Forrest* *Home* agt. *Keeler*, 9 *Rep.*, 432; *Alte* agt. *Rotter*, 4 *Dill.*, 562; *Bright* agt. *M. N. N. Co.*, 1 *Abb. N. C.*, 15; and see *Removal Cases*, 10 *Otto*, 473). (2.) The affidavits show that one of the plaintiffs is a citizen and resident of this state. The same is true of one of the defendants. That is fatal to a removal under the act of 1875. All the persons constituting "the party" on one side must be citizens of different states from those on the other side (*Burke* agt. *Flood*, 9 *Rep.*, 501; *Lawyer* agt. *S. M. I. Co.*, 14 *Blatchf.*, 451; *Chicago, St. L. R. W. Co.* agt. *McCourt*, 9 *Rep.*, 569). (3.) The averments of the petition are not conclusive on the state courts. We may ascertain the truth as to the existence of the requisite facts (*Clarke* agt. *Opdyke*, 10 *Hun*, 383).

Motion denied, with ten dollars costs.

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SUPREME COURT.

THE PEOPLE *ex rel.* TIMOTHY F. BUSH agt. WILLIAM L.
THORNTON.

Office and officer — Quo warranto to try title — What acts and promises of a candidate for office will invalidate his right thereto — Office not necessarily to be given to the qualified person having the next highest number of votes.

At a general election held in and for Sullivan county, the relator and the defendant were the two and only two candidates to be voted for in that county for the office of county judge. The whole number of votes cast was 6,179; of which defendant received 3,211, and the relator received 2,947. The certificate of election was given to the defendant by the board of county canvassers, and on January 1, 1879, he took possession of the office, having first taken the oath required by the Constitution and filed the necessary bond. The term of office was six years, and the salary as fixed by law was \$2,500 per annum. The defendant after he became a candidate for the office, and during the whole canvass, down to the day of election, published and circulated throughout the county a promise addressed to the electors to this effect: "That if elected to the office of county judge I will pledge myself to take only \$1,200 a year for my services; that I will pay out of my own pocket the coal necessary to heat my law office; that I will pay for all stationery and letter heads, and will see that persons needing blanks pay for them themselves, and if a member of assembly can be elected who will have the law amended reducing the salary to \$1,200, I will guarantee to waive all constitutional objections and never question its validity."

Held, that this was sufficient to invalidate the defendant's right to the office he now holds.

The promises and pledges of the defendant were made to the taxpayers and electors generally, and were of a character, within the fair spirit and meaning of the acts, impliedly prohibited by article 12, Constitution of this state.

It is not necessary that there should be evidence from any witness who voted at the election for defendant, that he did so in consequence of such pledges and promises. The illegal promises to induce votes having been affirmatively shown to have been made to every elector, more particularly to every taxpaying elector, the *onus* of showing the numbers of votes that were influenced thereby, should devolve upon the defendant, and it should devolve upon him to show the number of votes uninfluenced by such promises he did actually receive.

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An offer of a bribe is criminal, and this is so whether the offer is accepted or not. It disfranchises the party making the offer as well as the party influenced thereby:

Held, also, that the relator is not entitled to the office. He did not receive a majority of the votes of the legal electors who at that election cast ballots for the office of county judge, and consequently was not elected.

Sullivan Circuit, December, 1880.

ACTION of *quo warranto* tried at the Sullivan circuit in May, 1880. The facts will sufficiently appear in the opinion.

Hon. T. F. Bush and Benj. Reynolds, Esq., for relator

Jas. L. Stewart and C. V. R. Ludington, Esqrs., for defendant.

OSBORN, J. — The pleadings in this case are very voluminous, but the important facts can be briefly stated. These are really undisputed, and for that reason counsel in open court consented that I might take the case from the consideration of a jury and thus give to it such an examination as its importance seemed to demand.

At the general election held in and for the county of Sullivan, on the 5th day of November, 1878, the relator and the defendant were the two, and only two, candidates to be voted for in that county for the office of county judge. The whole number of votes cast for such office was six thousand one hundred and seventy-nine (6,179). Of these the defendant received three thousand two hundred and eleven (3,211), and the relator received two thousand nine hundred and forty-seven (2,947). The certificate of election was given to the defendant by the board of county canvassers, and on the 1st of January, 1879, he took possession of the office, having first taken the oath required by the constitution and filed the necessary bond. The term of office was six years and the salary as fixed by law was \$2,500 per annum. The defendant was nominated by the greenback county convention held Sep-

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tember 20th, 1878, and the relator was nominated at the democratic county convention held October 15th, 1878. At the greenback convention the following resolution was adopted :

“*Resolved*, That the salary of the county judge should be reduced to \$1,250 ; of member of assembly to \$750 ; of school commissioner to \$600 ; of special county judge to \$200 ; county clerk's fees should be reduced fifty per cent.”

The defendant accepted the nomination with full knowledge of this resolution, and very soon thereafter caused to be printed and published in two newspapers of the county a very lengthy circular — to be found in the complaint at folio six to eighteen inclusive — addressed “to the overburdened taxpayers of Sullivan county.” This document is too lengthy to be here inserted. It is an effort to show in a variety of ways, and by different processes of reasoning, that the legal salary (\$2,500) was grossly excessive in amount, and is a most earnest and powerful appeal to *these “overburdened taxpayers”* to support the nominees of the greenback convention, who would discharge the duties of the various offices mentioned in the resolution and for the sum therein named.

Perhaps all that is of particular importance in this lengthy circular is the following :

“William L. Thornton has accepted the nomination of county judge, and should he be elected will pledge himself to take from the county \$1,200 only of the salary now allowed by law ; and if a member of assembly can be elected who will have the law amended reducing the salary to \$1,200, the said Thornton will guarantee to waive all constitutional objections and never question its validity.”

After causing this circular to be printed and published in the newspapers, he procured the same to be printed in the form of a large handbill, and to be generally distributed and circulated among the electors of the county.

A day or two after the democratic convention was held, and which nominated the relator, the defendant caused to be printed and published in the two newspapers printed and pub-

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lished in the county, a communication over his own signature, a portion of which is as follows :

“MONTICELLO, 16th October, 1878.

“*To the electors of Sullivan county* — I here repeat that if elected to the office of county judge I will pledge myself to take only \$1,200 a year for my services. That I will pay out of my own pocket the coal necessary to heat my law office. That I will pay for all stationery and letter heads, and will see that persons needing blanks pay for them themselves. If, by so doing, I have committed a criminal offense, let judge Bush make the most of it by lodging a complaint against me before the next grand jury.

Has heaping on taxes become a virtue in this county, and an attempt to reduce them become a crime? Let the people answer.

WILLIAM L. THORNTON.”

A week or so before the election, the defendant with two sureties executed and acknowledged a written bond and caused the same to be published in the four newspapers aforesaid, conditioned as follows :

“Whereas, the above bounden W. L. Thornton has been placed in nomination for the office of county judge, agreeing to pledge himself if elected to perform the duties of said office for the sum of \$1,200, the balance of \$1,300, should the supervisors persist in raising the same, shall be turned over to the poor fund to the credit of the county.”

The bond further recited that if this agreement was kept then the obligation was to be void, otherwise the county treasurer of the county, and his successors in office, were authorized to prosecute the same for the benefit of the people of the county, to recover any excess which the said Thornton might take for salary over and above the \$1,200.

It was dated and acknowledged October 28th, 1878, and was signed by the said Thornton as principal, and by C. V. R. Ludington and G. B. Wales as sureties.

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It was in the penal sum of \$10,000, and the sureties were men of high standing and well known financial responsibility throughout the county.

The facts further show, that the promises and pledges of the defendant were published and kept prominently before the electors and taxpayers, during the entire political campaign, by the newspapers that supported him ; by the circular, letter, and bond, above referred to and set forth, as well as by speeches made at political meetings all through the county addressed by the defendant and others ; that these promises and pledges became known to nearly if not all the electors in the county, is entirely obvious.

It is also apparent that all these acts of the defendant were done for the only purpose of influencing votes in his favor for the office of county judge.

And here let me say, that I do not charge that the defendant believed that these acts or pledges, or any of them, were illegal, or that they could be claimed to impair his title or right to hold the office and discharge its duties in the event of an election. Nor is it necessary to the decision of this cause that I should find that the oath of office was not honestly or conscientiously taken by him under the belief that the promises and pledges he made were not illegal and in violation thereof.

It may be that the convention which passed the resolution, and the incumbent who indorsed it and made the promises, pledges and bond above referred to, did so upon the honest supposition that the public interests demanded a reduction in the salary of county judge.

It is safe to go still further and assume, for the purposes of the argument, that the salary fixed by law was excessive. This can make no difference in the conclusion to be arrived at. The law has provided a way to correct the wrong, but it could not be done in the manner undertaken by the defendant and his supporters.

This brings us to consider the two legal questions presented,

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which are: First. Whether the acts complained of invalidate the defendant's right to the office he now holds; and, second, if so, is the relator entitled thereto?

By the constitution of this state, as amended in 1869, additional jurisdiction, and with it additional labor and dignity were conferred upon the county courts (*Article VI, sec. 15*).

By this amendment the term of office of county judge was increased from four to six years (*Sec. 15*). The salary was to be fixed by law and not by the board of supervisors, as formerly.

In addition to the powers formerly exercised, the county court (*sec. 15*) was given original jurisdiction in all cases where the defendants resided in the county and the damages claimed do not exceed \$1,000. The county judge by this amendment is given power to hold county courts, and to preside at courts of sessions in any of the counties of the state, except New York and Kings. By section 21, in two or three counties of the state, he is prohibited from practicing as an attorney or counselor in any court, or acting as referee. He is also to preside at all courts of sessions in his county, and in which court nearly all criminal causes are tried, except murder and arson in the first degree. In the county of Sullivan he is also to perform the important duties of surrogate.

Thus it will be readily seen how important and responsible are the duties a county judge is called upon to perform. Its incumbent should be a lawyer of conceded ability and legal learning; a man of unquestioned honor and integrity. He should receive for his services a fair, liberal salary to be fixed by law, and not by the constantly changing views of a board of supervisors, or the action of any political convention. This is regarded as of so much importance that the constitution of the state expressly prohibits even the legislature from diminishing the salary allowed by law so as to affect a present incumbent.

At the time of the defendant's election, and on January 1, 1879, when he entered upon the duties of his office, the salary

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of the county judge of Sullivan county was fixed by law at \$2,500 per annum. But before the defendant could assume to act he was obliged within the time fixed by law to take the oath of office prescribed by the Constitution. This is as follows:

“Members of the legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted, *shall* before they enter on the duties of their respective offices take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the state of New York, and that I will faithfully discharge the duties of the office of ——— according to the best of my ability.

And all such officers who shall have been chosen at any election shall, before they enter upon the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto as part thereof. And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing, as a consideration or reward for the giving or withholding of a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote” (*Art. XII, Con. of the state*).

Now this was the oath the defendant was required to and did take. It is not a mere matter of form, an idle, useless ceremony, but a most solemn act which the Constitution imperatively required before he could do any official act. A neglect or refusal to take it would render his election nugatory, and create a vacancy in the office.

It was not until a very recent amendment of article XII of our Constitution that the latter part of this oath was incorporated therein. It has well been called an iron-clad oath. The wholesome provisions of our common law in reference to

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bribery ; of our statutes and constitutions as they existed prior to this amendment, had all proved abortive to a very considerable extent, in preserving the purity of the elective franchise, and in securing what is so indispensably necessary to the existence of a republican form of government and the perpetuity of our institutions, the free, unprejudiced and unbiassed action of the electors.

Our elections were not a fair expression of the public will expressed through the ballot box ; but oftentimes a mockery and disgrace in consequence of the corrupting influences and means used. Honesty and competency on the part of those who aspired to places of honor, trust and emolument were often regarded as of far less consequence than the ability of such aspirant and his followers, by illegal means and practices, to accomplish for himself, success, and for his party, a partisan triumph.

This recent amendment was aimed at the very vitals of this monster evil.

Its design was to go further than simply to prevent the illegal offerer and its acceptor from the right to vote if challenged ; further than the power of the court to throw out the vote so influenced in an action of *quo warranto* ; further than the right to punish criminally, which was not affected by this amendment.

It was to prevent, absolutely prevent, the successful candidate for office, who had been guilty of illegal practices ; who had been making promises and pledges to influence votes in his favor, such as are directly and indirectly brought within the letter of this obligation, from reaping any of the fruits of his election.

These words "directly or indirectly" as used, should be given their broadest meaning, and so the courts have held.

The promises and pledges of the defendant were made to the taxpayers and electors generally, and were of a character, I think, within the fair spirit and meaning of the acts impliedly prohibited by this constitutional obligation.

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Its effect, indirectly at least, is as if he had said to each individual taxpayer "elect me to the office of county judge and you shall receive a certain sum of money or shall be saved from the payment of a certain sum of money."

This sum could actually be named in amount, for it could be easily ascertained what the individual share of each taxpayer should be in the sum of \$1,300.

I am aware that there is no evidence from any witness who voted at the election for defendant, that he did so in consequence of such pledges and promises. This I regard immaterial, and so stated at the trial when the relator proposed to give evidence of such a character.

If the defendant had the right to make such offers to influence votes for him; if this was not in violation of the acts impliedly prohibited by the constitutional oath; of the law to preserve the purity of the election franchise, not against public policy, evincing moral turpitude, and so not to be condemned, then it would seem to be absurd to hold that the electors had not the right to be influenced thereby; or that all that can be done is simply to reject the votes of those who would, even if such evidence were permissible, testify that they were so influenced.

The promise was made with that intention, and it is but fair to assume that the object intended by such illegal promises was to some extent at least attained.

The illegal promises to induce votes having been affirmatively shown to have been made to every elector, more particularly to every taxpaying elector, the *onus* of showing the number of votes that were influenced thereby, should devolve upon the defendant, and it should devolve upon him to show the number of votes uninfluenced by such promises he did actually receive (*The People* agt. *Thatcher*, 55 *N. Y.*, 525; *People* agt. *Cook*, 8 *N. Y.*, 67; *People* agt. *Schroeder*, 26 *Ohio St. R.*, 550; *State* agt. *Stevens*, 23 *Kansas*, 456).

Indeed if there was no remedy in this case unless the people could show that a sufficient number of votes cast for the

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defendant to overcome his majority had been actually obtained by means of the influence offered, it would be difficult, if not impossible, to correct the evil complained of.

By his own acts this difficulty or impossibility exists in separating the votes cast for him that were or were not influenced by such illegal promises, and therefore the burden of such an undertaking should be upon the person who has caused such difficulty or impossibility.

This, I think, is in accordance with the authorities above cited (*See, also, Matter of Barber*, 10 *Phil. Rep.*, 579, 590, 593; *Duffy's case*, 4 *Brewster*, 533, 549, 561; 2 *Luzerne Legal Register*, 49).

I have thus attempted to show the illegality of these promises and that they are within the acts impliedly prohibited by the Constitution, and that in view of them the defendant could not truthfully take the oath he did, and the question that now naturally suggests itself is, can the incumbent defeat or frustrate the purpose and object which was intended to be accomplished by innocently or corruptly taking the same? Is it sufficient that the defendant should go through the mere form of taking the oath when his own admissions of what he has done, show promises of a character prohibited thereby?

In the case of the *People ex rel. agt. William F. Allen, Comptroller, &c.*, where the question was, whether an act of the legislature was constitutional or not, the court held "that it is not enough to make a law constitutional that its language should be in such form as to comply with the requirements of the Constitution; it must comply with them in substance. If it evade the terms and frustrate the general and clearly expressed, or necessarily implied, purposes of the Constitution, it is as clearly void as if expressly and in direct terms forbidden" (*People agt. Allen*, 42 *N. Y.*, 404). To the same effect *People agt. Allison* (55 *N. Y.*, 50). In this last case the court in its opinion makes use of substantially the same language as last above quoted.

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I think it must be regarded as self-evident that the defendant can stand in no better position from the fact of his having taken the oath than as though he had not taken it at all. This must be so, if I am right in holding what I do, in reference to the character of the promises and pledges made.

Suppose the Constitution required that the defendant, before entering upon the duties of his office, should take an oath that he was thirty years of age, and he should take it, when in fact he was only twenty-five; could he retain the office simply because he had taken the oath, when the true fact was clearly shown in an action of *quo warranto*?

In an action of this character the title of the defendant to the office he holds becomes an open question, and it must be made to appear to the court that his possession is a legal and rightful one. His certificate of election, his oath taken and filed, are doubtless *prima facie* evidence of his right to hold and enjoy the office.

But this is not conclusive, the whole question is open to investigation (*People ex rel. Judson agt. Thatcher*, 55 *N. Y.*, 525). An action of this character is a substitute for the ancient writ of *quo warranto*, a writ of right for the king against one who usurps an office, franchise or liberty, to inquire by what authority he supports his claim in order to determine the right (3 *Bl. Com.*, 262). And in this state the rule is well established that the burden is upon the defendant to show his right, and that failing to do so, judgment must go against him (*People agt. Utica Ins. Co.*, 15 *Johns.*, 358; *People agt. Pease*, 27 *N. Y.*, 63; *Cole on Quo Warranto*, 221).

It would seem, from what has already been said, that the discussion as to the defendant's rights might safely end here. But as another reason, independent of the one considered can be successfully advanced to invalidate his title, it ought not to go unconsidered in a case so important. And here we are not left to arrive at a conclusion without the aid of judicial precedent and adjudication, as will be presently seen.

An offer of a bribe is criminal (1 *Statutes at Large*, 145, *sec.*

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4; *Laws of 1842, chap. 130*; 2 *Bishop's Crim. Law, sec. 98*; 1 *Russell on Crimes, 154*; *Wade's Election Code, 142*).

And this is so whether the offer is accepted or not (*See cases above cited, also 65 Ill. Rep., 61*).

By reference to section 2, article 2, of our Constitution, it will be seen that it disfranchises the party making the offer as well as the party influenced thereby.

This section was incorporated into our Constitution, by the amendment of 1874. The language used is important, and therefore a few lines are quoted: "No person who shall receive, expect, or offer to receive or pay, offer or promise to pay, contribute, offer or promise to contribute to another any money or other valuable thing as a compensation or reward for the giving or withholding of a vote at an election, or who shall make any promise to influence the giving or withholding of any such vote, &c., shall not vote at such election."

This same disqualification on account of bribery existed at common law (*Rogers on Elections* [11th ed.], 246, 333-335; 2 *Peckwell, 245, 246*).

In the Litchfield case (1st *O'Malley agt. Hardcastle, 26*) Mr. justice WILLIS lays down the rule thus: "With respect to bribery the law is perfectly clear. Bribery by common law equally as by act of parliament avoided any election at which it occurred. If there were any general bribery, no matter from what fund, or by what person, and although the sitting member and his agents had nothing to do with it, it would defeat an election on the ground that it was not a proceeding pure and free as an election ought to be, but corrupted and vitiated by an influence which, coming no matter from what quarter, had defeated it and shown it to be abortive."

In the Dublin case (*same volume, 293*) lord KEOGH after commenting upon and approving the remarks of Mr. justice WILLIS above quoted, and also of a statute declaring that a promise to pay the traveling expenses of a voter, conditioned on his voting for a particular candidate, says: "But without this (meaning the statute) I should have thought that such a

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promise was an act of bribery from the earliest times, and I have the greatest authority in the law of England for that proposition."

In 1748, lord MANSFIELD spoke against, and defeated a bill which had been introduced into the house of lords, declaring that the payment of traveling expenses to a voter was an act of bribery, by insisting that such a promise was subject to the penalties and therefore no such bill was necessary.

Nor was it necessary that the offer or promise to influence a voter should go to him directly. Thus where a promise was made to influence a voter, to donate \$1,000 to a charitable purpose in which the voter was interested, it was held that this was within the inhibition (*Bradford Case*, 3d *O'Malley* agt. *Hardcastle*, 32; *Horsham Case*, same volume, 52; *Waterford Case*, same vol., 25; *The Plymouth Case*, same vol., 107).

Thus it will be seen from the earliest time and long prior to our existence as a nation, the purity of the elective franchise, the free, unbiased, unprejudiced and uninfluenced action of every voter has been regarded as of the most vital importance, and bribery the subject of investigation and punishment.

But it may be claimed that bribery has been punished criminally only when the illegal offer or promise was made to or accepted by some particular individual or individuals. This is probably true.

It may be that the alleged illegal and unconstitutional offers and promises of the defendant to influence votes, were so general in their character that a criminal prosecution could not be expected or sustained. These were addressed to the whole body of electors in Sullivan county, or the taxpaying electors, and it would be idle to suppose that any indictment could be sustained against the whole body to whom the promises were addressed. But as they were made by a single individual for a corrupt and illegal purpose, it is not by any means certain that a criminal prosecution could not be sustained against one making such an offer, if it could be made to appear

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that the party knew that the act he was doing was in itself unlawful and prohibited, as has been demonstrated.

For the purposes of a correct decision of this action the court is not driven to any such extremity. The question is, how do these promises affect the defendant's right to retain the office he holds?

If he had said to each individual taxpaying elector of the county, in order to influence votes in his favor: "Vote for me and I will pay you a certain sum of money, or I will see that you are saved the payment of a certain sum of money in your taxes," naming the sum, and which might be just the proportion which each individual taxpayer would have to pay in order to raise the sum of \$1,300; this would clearly be an act of bribery to be punished criminally, and no intelligent man could innocently assume that this did not prevent him from truthfully taking the oath prescribed.

The sum to be paid by, or to be saved to each taxpayer would of course vary in amount, but could be easily ascertained by the most ordinary mathematician by ascertaining the proportion of the entire assessed valuation of such taxpayer to the entire assessed valuation of property in the county.

Instead of making such offers to the taxpayers separately, they were made to the taxpaying electors collectively.

Can it be maintained for a single moment that by so doing he is out from under the condemnation of the law, or that this in any manner prevents or lessens the evil which the law endeavors to prevent?

If so, this in effect would be saying that a wholesale attempt to influence and control the action of electors would be innocent in its character, and though the results arising therefrom might be of the most serious and dangerous character, the successful candidate might peaceably enjoy his office, without any possible disturbance from the courts; while an offer of the same character made personally to a single individual would invalidate his title and subject him to severe punishment.

As before stated these offers were made generally to the

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electors ; were intended to influence their action, and there is evidence from which it may be inferred that the defendant received a large support from that class to whom the promises were addressed.

While it may not be fair to assume that every elector who cast his vote for the defendant was induced to do so in consequence thereof ; it is fair to assume that the effect intended thereby was in some measure attained.

The general principle contended for by the defendant, "that the law presumes every voter to cast a legal vote until the contrary is shown," is correct in principle, and well settled by authority. This principle was fully recognized by me in another *quo warranto* action tried at the same circuit (*People agt. Pease*, 27 N. Y., 63, p. 74 *opinion*).

The difficulty with the defendant, however, is that for reasons which have been fully stated he can receive no benefit from invoking that principle.

In the case of the *State agt. Purdy* (36 Wis. R., 213 ; 14 Am. Law Reg. No. 5, 90), the contest was between two individuals as to which was entitled to the office of county judge. The relator claiming it in consequence of the reception of twenty-three more votes than the incumbent. The latter, however, claimed in his answer "that the salary of the county judge was fixed by law at \$1,000 ; that the relator being a candidate for the office, published and circulated throughout the county a promise, addressed to the electors, that if elected county judge he would perform all the duties, and furnish an office and all other incidentals except the record books, for \$600 per annum during his term ; and that solely by this offer 100 of the voters of the county were induced to vote for the relator, thus securing his election." It was held by the court on demurrer to the answer, in a well considered and carefully written opinion. that this was sufficient to defeat the title of the party making such offer. See *McCrary on Elections* (2d ed., sec. 147) where this Wisconsin case is referred to and the doctrines therein approved.

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In the case of the *State agt. Collier* (*Sup. Court of Missouri, reported in vol. 18, Am. Law Reg. [N. S.], 768*) the following doctrine is held: "Where a candidate for a public office publicly pledged himself to the voters of his district, that if elected, he would perform the duties of his office for less than half the fees allowed by law, and in consequence of which taxpayers were induced to vote for him who would not otherwise have done so, whereby he was elected. That such an offer and pledge tended to corruption; was demoralizing in its tendencies and utterly subversive of the plainest dictates of public policy; and that the title to the office thereby obtained was invalid."

In these cases the question arose as in the case at bar, by an action of *quo warranto*, but in neither of these cases cited was the incumbent required to take any oath in which such offers were impliedly prohibited.

But it may be said that the question in each case was raised by demurrer which admitted all the allegations in the pleadings, and among others, that a sufficient number of voters were influenced by the promise to change the result; that it was only necessary to decide in those cases that the votes so influenced were null and void. This the court did, in each case, judicially determine. But the whole reasoning of the court goes to the extent of holding the entire transaction a fraud and nullity; a species of bribery clearly against public policy and not to be tolerated.

In the Missouri case the court in its opinions, among other things, says: "It is not necessary to show, as claimed by respondent that he, or those who voted for him, have been guilty of bribery in its strict sense. In instances involving the freedom and purity of elections, that term possesses a broader significance. It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude or are against public policy."

In the case of *Tucker agt. Aiken* (7 *New Hampshire*, 140), where practice had obtained of putting up at public auction

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and of disposing of the office of constable to the highest, and the office of collector to the lowest bidder, the court in pronouncing judgment invalidating the title to the offices so obtained, says: "This has a direct tendency to divert the attention of the electors from the qualifications of the candidates to the terms on which they will consent to serve, and makes the choice turn upon considerations which ought not to have an influence." To same effect, *Alvord* agt. *Collins*, 20 *Pickering* [*Mass.*]).

In the case of *Canothers* agt. *Russell*, recently decided in the state of Iowa, the facts were briefly as follows, and it will be seen they are almost identical with the facts in this case. At the fall election 1878, in Jasper county, Iowa, the defendant was nominated for the office of recorder and received 102 majority. At the convention that nominated him a resolution was adopted pledging "that the candidate for recorder should pay over and into the county treasury, to the credit of the contingent fund, all his fees in excess of \$1,000. The defendant agreed to it knowing that his fees would amount, as allowed by law, to at least \$2,000. This was used by defendant and his supporters to influence votes in his favor."

The action was brought by an elector under a provision of the Iowa Code, which provided that an action to contest the title of any incumbent to an office might be brought by any elector, whenever the candidate had given or offered a bribe. The sole question was, whether such an offer was a bribe or an offer of a bribe in such a sense as to invalidate the election or defeat the defendant's title. It was first tried before a court of contest, which decided against the title of the incumbent. From this an appeal was taken to the circuit court, where a trial was had, and with a like result. From this the incumbent appealed to the supreme court of the state, where the judgment of the circuit was affirmed. The judge at the circuit, among other instructions to the jury, gave the following:

Third. "If you find from the evidence that the conven-

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tion which placed the incumbent in nomination passed the resolution which has been introduced in evidence; that the incumbent then and there publicly indorsed it, and pledged himself to carry out the same; that the resolution was circulated through the county and used as an argument by the incumbent and his friends for the purpose of influencing the electors to vote for him for the office named, *then you are instructed that the incumbent is disqualified from holding the office.*"

This instruction was answered in the affirmative by the jury. It will be seen that in it (the instruction) nothing whatever was said as to whether voters were or were not influenced thereby.

This was affirmed by the supreme court of Iowa, and a very learned and able opinion therein was pronounced by chief justice ADAMS.

So that it will be seen that there has been an entire uniformity in the decisions of the court whenever and wherever they have been pronounced, upon the effect of such promises in impairing the title of an incumbent using the same.

Need I go further — need I speak more fully of the evil consequences that would inevitably result if a different doctrine were to prevail?

If one, in order to obtain his election, may offer to give to the taxpayers directly or indirectly one-half of his legal salary as an inducement for the giving or withholding of votes, he can certainly offer to give the whole of such salary. Nor would it end here. If this can be done; if the courts will tolerate such practices, then there is nothing to prevent an aspirant for any elective office within the gift of the people, in any department of the government — national, state or county, executive, legislative or judicial — from offering to the taxpayers not only to discharge its duties gratuitously, but in addition thereto to promise any amount he may be willing to pay into the national, state or county treasury, for the benefit and relief of such taxpayers, and from no other or

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higher motive than thus to influence and corrupt their votes.

It follows, therefore, from what has been said, that the defendant cannot retain his title to the office he now holds; that he is not entitled to the benefit of the votes that were cast for him, and that a judgment of ouster must be given.

I regret that my investigations have forced me to this conclusion. It is always a delicate and embarrassing duty to render a decision that seems to overthrow the wish and will of a majority of the electors of any locality as expressed through the ballot-box. But duty must be bravely performed without fear or favor. Courts, if honest, cannot be expected to override well-established principles of law to obtain public approval, or to float along in a popular current.

If I am wrong, there are appellate tribunals to which the defendant may appeal and have the wrong corrected. Until this is done, I am quite willing to abide the consequences of fair, honest and legal criticism of the views herein expressed.

But I have no time or patience to notice the adverse criticism of newspaper scribblers, who are always heard from whenever a decision is made of this character, and whose only notions or knowledge of its soundness or unsoundness are founded upon the fact that it is or is not in accordance with their personal or partisan feelings.

It only remains, in conclusion, to ascertain whether the relator, Bush, is entitled to the office. I think, clearly not. He did not receive a majority of the votes of the legal electors who at that election cast ballots for the office of county judge, and consequently was not elected (*People agt. Clute*, 50 *N. Y.*, 451; *State agt. Giles*, 1 *Chandler* [*Wis.*], 112; 2 *Pinney*, 166; *State agt. Smith*, 12 *Wis.*, 497).

The electors who voted for the defendant were legal electors, and exercised their right to vote for the office, so that their views upon it were expressed.

By reason of facts *aliunde*, these votes cannot be allowed to the defendant, as we have seen, or at least are of no avail

The People *ex rel.* Bush agt. Thornton.

to him. In the *State agt. Tierney* (23 *Wis.*, 430) it was held "that, in *quo warranto* as to an elective office, the question is, whether the defendant at the election under which he claims received a majority of all the votes cast, which the canvassers had a right to count."

Applying this rule to the relator, it is clear he did not receive a majority of *such* votes.

In *Fish agt. Collins* (21 *Louisiana Ann.*, 280) it was held "that the election of a party to an office does not depend upon the ineligibility of his competitor, but upon the will of a majority or plurality of the legal voters of the district," (meaning, of course, the legal voters who exercised the right of suffrage). To same effect *Matter of Corliss* (11 *R. I.*, 638; 16 *Am. Law Reg.*, No. 5, 15); *Renner agt. Bennett* (21 *Ohio St. R.*, 431); *People agt. Molitor* (23 *Mich.*, 341).

It is due to myself to state that, in view of the fact that the questions discussed in this opinion are interesting and important, and, so far as I can ascertain, never before the courts of this state for adjudication, I have given to them the most careful examination and extensive research. I have also presented them, without suggesting any impressions of my own to some of the ablest lawyers and jurists in the state, who have without exception (and some of them after an examination) concurred in the conclusions I have reached.

Equitable Life Assurance Society agt. Schermerhorn.

SUPREME COURT.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES agt. JOHN SCHERMERHOEN, ALFRED W. CRAVEN, ALFRED SCHERMERHORN and ALFRED W. CRAVEN, as trustees of GUSTAVE DE MACARTY.

Complaint — Demurrer — Parties — Improper joinder of causes of action — Code of Civil Procedure, section 484 — All causes of action united must affect all the parties to the action.

A cause of action for damages for malicious trespass by the original defendants for the erection and continuance of brick stacks, and another for the removal of these stacks and for injunction against their maintenance and continuance, are improperly joined as against the successors in interest of the original defendants, who are made parties by a supplemental complaint reviving the action. As the newly made parties cannot be charged in tort, the two causes of action do not affect all the parties to the action, as required by section 484 of the Code.

Special Term, March, 1881.

THE action was commenced against the parties above named. The plaintiff alleged that on May 1, 1874, and at all times thereafter, it was seized and possessed of certain premises known as No. 12 Pine street, in the city of New York, describing the same by appropriate metes and boundaries, upon part of which a substantial structure had been erected, constituting a wing or addition to what was known as the Equitable Life Building for the use of which a proper supply of light and air were necessary. That such structure was set back from the line of ownership and possession of the plaintiff in the rear of the premises No. 17 Nassau street, owned and in possession of the defendants.

That the defendants, upon motives of malice and extortion, have erected and now maintain partly upon their own prem-

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ises and partly upon the premises of the plaintiff, two tall brick stacks leaning directly against plaintiff's wall and the windows therein, effectually and absolutely blocking up and shutting out all air and light therefrom. That such stacks are of no utility whatever, except for purposes of malicious annoyance of the plaintiff. That they are intended to be and are a permanent encroachment and appropriation of plaintiff's land to its great injury and depreciation in value. That such injury is not entirely susceptible of pecuniary compensation.

The plaintiff asks for an injunction restraining the use and continuance of said stacks, the removal thereof and damages for the injury sustained by their erection.

The defendants appeared and answered and the cause came on for trial, when it appeared that the defendants Alfred Schermerhorn and Alfred W. Craven had died *ad interim*, and also that John Egmont Schermerhorn had been duly appointed trustee of Gustave De Macarty in place of said Schermerhorn and Craven, deceased. An order was made November 20, 1879, that the successors in interest of the parties deceased be made parties to this action, and that plaintiff have leave to issue a supplemental summons, and to make and file a supplemental complaint reviving the action. This has been done and demurrers are now interposed to the supplemental complaint:

First. That two causes of action have been improperly united therein.

Second. That the complaint does not state facts sufficient to constitute a cause of action.

Joseph Larocque, for demurrer.

James Thompson, opposed.

LARREMORE, J. — The demurrer is laid to the supplemental complaint, which refers to, and incorporates as part thereof, the original complaint in this action. It is alleged that such

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supplemental complaint was made in pursuance of an order of this court, dated November 20, 1879, a copy of which is annexed thereto, whereby the widow, heirs-at-law, devisees, legal representatives, trustees and successors in interest of the deceased defendants in the original complaint were directed to be made parties, which was accordingly done.

Two causes of action are presented by the complaint :

1st. A claim for \$20,000 damages for a malicious trespass by the original defendants, for the erection and continuance of the brick stacks mentioned in the complaint.

2d. The removal of the same from plaintiff's property, and injunctive process demanded against their maintenance and continuance.

It is difficult to reconcile these causes of action with section 384 of the Code of Civil Procedure. The newly made defendants cannot be charged in tort for an act beyond their control and, so far as appears, without their knowledge.

Nor is it evident that the legal representatives of Schermerhorn and Craven, in whom no title to the premises in question is vested, are proper parties to an action for the removal of unauthorized structures thereon, and for a perpetual injunction restraining the continuance thereof.

The statute says (*sec. 484, sub. 9*) that all causes of action united as therein provided must affect all the parties to the action. This test clearly distinguishes the case at bar. The order of November 20, 1879, should not control, as a clear issue of law is now presented for adjudication.

The demurrers are sustained, with leave to plaintiff to amend on payment of costs.

Wilson Sewing Machine Company, agt. Fuller.

SUPREME COURT.

THE WILSON SEWING MACHINE COMPANY agt. FRANCES L.
FULLER, impleaded, &c.

Married women — Power to charge their separate estates.

Where the complaint alleged that the defendants executed a bond to the plaintiff for \$7,500, guaranteeing the payment of all indebtedness that might be incurred by one H. L. Wilcox to the plaintiff, and that defendant F. in said bond expressly charged her separate estate with the payment; then set out breaches of the bond and demanded judgment. F., the defendant, set up by answer "that at the time of the making of said bond she was, and still is, a married woman, and has had no separate estate and has carried on no separate trade or business."

Held, that the complaint should be dismissed as to defendant F. If she had no separate estate at the time of the execution of the bond, she was not competent to enter into the contract which the bond contains.

A married woman cannot give herself a legal capacity to contract by falsely representing that she has such capacity.

New York Circuit, February, 1881.

THE complaint alleged that the defendants executed a bond to the plaintiff, dated November 23, 1875, for \$7,500, guaranteeing the payment of all indebtedness that might be incurred by one H. L. Wilcox to the plaintiff, and that the defendant, Frances L. Fuller in said bond, expressly charged her separate estate with the payment.

The complaint then set out breaches of the bond and demanded judgment.

Said defendant set up by answer "that at the time of the making of said bond she was, and still is, a married woman, and has had no separate estate and has carried on no separate trade or business."

The case came on for trial at a circuit on February 21, 1881, and when the evidence was in, no dispute about the facts of

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the defense arising, a motion was made to dismiss the complaint as to said defendant.

Horace Secor, Jr., for defendant, cited *Manhattan B. & M. Co. agt. Thompson* (58 *N. Y.*, 80). The power to charge her separate estate by a married woman presupposes that she has a separate estate, and if she has not, she is under the common law disability (*Switzer agt. Valentine*, 4 *Duer*, 96; *Wood agt. Sanchey*, 3 *Daly*, 198; *Baker agt. Lamb*, 11 *Hun*, 521). She is not estopped, as estoppel only applies to a married woman in so far as her capacities have been enlarged (44 *N. Y.*, 249; 53 *id.*, 96).

Betts, Atterbury & Betts, for plaintiff, insisted that she was liable within the decision in *Cashman agt. Henry* (12 *J. & S.*, 93; *S. C.*, 75 *N. Y.*, 103).

LAWRENCE, *J.* — There must be a dismissal of the complaint as against the defendant Frances L. Fuller. If she had no separate estate at the time of the execution of the bond, she was not competent to enter into the contract which the bond contains.

In the language of BOARDMAN, *J.*, in *Baker agt. Lamb* (11 *Hun*, 522), "a married woman cannot give herself a legal capacity to contract by falsely representing that she has such capacity."

I do not regard the case of *Cashman agt. Henry* as in conflict with the views expressed in *Baker agt. Lamb*.

Judgment is, therefore, granted, dismissing the complaint as to the defendant Frances L. Fuller.

Blunt agt. The Mayor.

SUPREME COURT.

HIRAM S. BLUNT, respondent, agt. THE MAYOR, ALDERMEN
AND COMMONALTY OF THE CITY OF NEW YORK.

New York (city of)—Attendants or officers of the supreme court—how appointed—Effect of act (Laws 1872, chap. 438) on officers then holding office.

The effect of the act of 1872, vesting in the judges of the supreme court the power to appoint attendants (*Laws of 1872, chap. 438*), though it took effect immediately, did not so operate as to terminate the existing office, or impair its functions, or remove incumbents; it transferred the power of appointment from one officer to another body of officers; but the omission of the latter to use their authority could not be construed into a removal of the existing officers, although a new appointment by the judges of another person to the same office would necessarily have that effect.

The officer *ad interim* would be entitled to compensation if he had rendered the services (*The case of Genet agt. The Mayor, 76 N. Y., 625, not in conflict*).

First Department, General Term, May, 1879.

Before BRADY, P. J., INGALLS and BARRETT, JJ.

THE plaintiff was employed as an attendant on the supreme court in 1864, and continued to hold such position till June 1, 1872. His compensation was fixed at \$1,200 per annum, and he has been paid for his services except for the month of May, 1872, and this action was brought to recover the sum of \$100. The testimony shows that he was an attendant on the court, and performed the services required of him; and that so soon as he found that his name was not on the pay roll he left the court. Verdict was directed in favor of plaintiff, and defendant has appealed from the judgment.

The defendants offered in evidence two documents only, which were admitted, and thereupon moved to dismiss the

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complaint, on the ground that the evidence showed that all the officers authorized by chapter 438 of 1872 had been appointed and paid for May, 1872. This the court denied, and defendants excepted.

Elliot Sandford, for respondent.

I. This exception was not well founded, and the ruling of the court was correct. The Code in 1864 gave the supervisors power to employ attendants (*Sec.* 28). This power was conferred on the judges of the court April 29, 1872, by chapter 438, Laws 1872, but the number of appointees was limited to four for each part of the court. That statute did not remove the plaintiff. It was only "when the court acted under the act of 1872, and appointed one or twenty attendants, the appointments and designations under the former act became, and were, a nullity" (*Holly* agt. *The Mayor*, 59 *N. Y.*, 166, 169; *People* agt. *Green*, opinion by DAVIS, J., not reported; *Westervelt* agt. *The Mayor*, not reported). In the case of *The People ex rel. Doyle* agt. *Green*, Mr. justice NOAH DAVIS held as follows, March, 1873, at Chambers: "On the 29th of April, 1872, the legislature conferred the power of appointment of such officers for their courts upon the judges of the superior court. The act took effect immediately; but the judges of the superior court did not make the appointment under it until the eleventh day of June following, at which they appointed the relator. In the interval between the first of May and the eleventh day of June the relator continued to discharge the duties of the office. The sole question in controversy is, whether he is entitled to his salary during that period. * * * There is nothing in the act of April, 1872, which operates to terminate the existing office, or impair its functions, or remove incumbents. It transfers the power of appointment from one officer to another body of officers; but the omission of the latter to use their authority cannot be construed into a removal of the existing officers. A new appointment by the judges of

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another person to the same office would have that effect, but no such consequence can be held to flow from mere delay. In the mean time, and pending such delay, the recognition of the officer by the judges in discharge of his duties should be construed as an appointment rather than as a displacement. It is against the policy of law that offices deemed by the legislature of sufficient importance to the public to be provided for by statute, should become vacant by mere construction. The case, I think, is within the spirit of the general statute, enacted to guard against the happening of vacancies in office (1 *R. S.* [*Edm. ed.*], 107). I think the relator is clearly entitled to his pay for the interval between the 1st of May and the 11th of June, 1872."

II. The certificate made out by the three judges, June 1, 1872, if evidence at all, is no evidence that any attendants were appointed by the court under the act of 1872. It simply certifies that certain persons were serving as attendants. The omission of plaintiff's name from the list is no proof that he was not also "duly serving." It cannot be received as evidence for any purpose as against the plaintiff, who was a stranger to it (45 *N. Y.*, 19; 8 *Cow.*, 45; 6 *Cowen*, 261; 1 *Greenl. on Ev.*, sec. 498; 2 *Abb. Ct. App. Dec.*, 64; 54 *N. Y.*, 353). This certificate was in no way connected with the plaintiff. He was continued in service during the month of May, and a certificate dated June 1, 1872, cannot be received as evidence of removal in the month of May, and made to relate to a prior date. The pay-roll offered and allowed in evidence, under plaintiff's objection, was not evidence "for any purpose as against the plaintiff, and was not competent to prove the number of attendants in regular service, having rights prior or paramount to the plaintiff" (*Brennan agt. The Mayor*, 62 *N. Y.*, 365, 369; *Garrigue agt. Loescher*, 3 *Bosw.*, 578; *DeGraff agt. Hovey*, 16 *Abb.*, 120). The pay-roll and certificate were of no higher grade of testimony than a conversation or an *ex parte* statement. They were both made subsequent to the date of plaintiff's service, and after his

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rights were vested (*Burnham* agt. *Thurman*, 2 *Jones & S.*, 536).

III. The exception to the direction of the court to the jury to find a verdict for plaintiff presents no other question of law. The ruling of the court below was correct, and judgment should be affirmed.

On motion of defendants a reargument was ordered, because, as was alleged, the case was in conflict with the case of *Genet* agt. *The Mayor* (76 *N. Y.*, 625). On such reargument *Mr. Sandford*, for respondents, contended that this case does not depend upon the *Genet* case in any manner; they are wholly dissimilar. *Genet* claimed compensation from January to June, 1872. The defense was, that the plaintiff, at the time he claimed, was not an attendant on the court, and the jury so decided, and found that he was not entitled to any compensation after January 1, 1872, and the court of appeals held that he had been removed in October, 1871. The effect of chapter 348, passed April 29, 1872, was not involved in the case, and was not discussed. In this case the plaintiff, Blunt, does not seek to recover for services *after* the date of the certificate of the judges of the supreme court, viz., June 1, 1872. In the *Genet* case, the main question was that of appointment through a recognition by the court after October 1, 1871; and the jury to whom this disputed fact was left, found he was not so appointed, although he had been paid by comptroller Green up to January, 1872. In this case the plaintiff had been an attendant for eight years, and had not been removed. The answer alleges that he had been removed in May by the judges. As to the proof presented by the defendants, we insist it was wholly incompetent to sustain this defense, and there is nothing in the *Genet* case to sustain such evidence.

Wm. C. Whitney, corporation counsel, and *D. J. Dean*, of counsel.

I. The plaintiff's employment as attendant upon the court terminated prior to May 1, 1872. (1.) By chapter 438, Laws

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of 1872, which was enacted and took effect on the 29th April, 1872, it is provided that the judges of the supreme court shall have power to appoint four officers for each part of said court, &c. That no other officers or clerks shall be appointed than is therein provided for; neither shall any clerks or officers of said courts be appointed by any other person or authority. (2.) By the proof it appears that twenty-four officers (four for each of the six parts of the court), other than the plaintiff, were appointed by the court and have been paid by the defendants for attendance during the month of May. (3.) Therefore, it follows that, if the plaintiff may recover in this action, the mandate of the statute, that no other officer shall be appointed than is therein provided, will be disregarded and nullified, and its restrictive provisions rendered ineffectual. (4.) The act of 1872, took effect immediately, and upon its passage terminated the right of the plaintiff to continue in his employment. The authority under which he was acting was superseded by the new law, and no formal removal by notice or otherwise was necessary. In a similar case, the court of appeals say, as to an officer of the marine court, "he held his position under a statute which had been repealed, and an authority which had been revoked, and neither a removal nor a *supersedeas* by the appointment of another in his place was necessary to terminate his employment" (*Holley* agt. *The Mayor*, 59 *N. Y. Rep.*, 169). (5.) If the plaintiff's claim is based upon his employment by the court prior to the act of 1872, without any claim of appointment or recognition by the court subsequently to that act, then he must be defeated upon the ground adjudged in the *Holley* case (*supra*), that the authority of all prior acts and employment thereunder was superseded and terminated by the act of 1872, and the appointments made thereunder. But if the plaintiff's claim to recover is founded upon the contention that by continuing to accept his services after the enactment of the act of 1872, the judges effectually, though not formally, appointed him under the act of 1872, that claim is answered by the fact which

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appears in the case, that four officers, other than the plaintiff, were formally appointed by the judges for each part of the court, and the power to appoint was thereby exhausted; the judges could not indirectly, by recognition and acceptance of the plaintiff's services, accomplish that which they could not do directly, viz.: appoint an officer in excess of the limit fixed by the law.

II. The judgment should be reversed, and a new trial ordered.

BRADY, *P. J.*—The appeal in this matter upon due deliberation was disposed of by affirming the judgment, but on motion therefor a reargument was ordered. It now appears that at the time the case was again submitted under the order just mentioned, an appeal had been taken to and was pending in the court of appeals. It may be questionable, therefore, whether this court has any jurisdiction of the case at present, but, inasmuch as the conclusion arrived at upon a reconsideration of the appeal is the same as that formerly expressed, it is of no consequence whether an appeal to the court of appeals is taken or not. The plaintiff in this action was employed as an attendant of this court under section 28 of the Code of Procedure, and so remained, it seems, until the 1st of June, 1872. On the 29th of April, 1872, the legislature, by chapter 438, vested in the judges of the court the power to appoint attendants, but it does not appear from any evidence in this case that the appointments were made by the judges of this court prior to the 1st of June, 1872. It is true that upon the trial herein, a certificate was introduced, signed by three judges of this court, in which it was stated that the persons named therein served as attendants, under the direction of the judges of the supreme court, for the month of May, 1872, on the six parts of the court, but this certificate is dated June 1st, 1872, and seems to be the record or attestation of a past event, and is not, therefore, in form, an appointment such as is contemplated by the act of the legislature already men-

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tioned. We think that the point presented in this case, which is necessarily the effect of the act just referred to upon the right of the plaintiff to recover, was properly disposed of by presiding justice DAVIS, in the case of *The People ex rel. Doyle agt. Green*, in which he held substantially that the act, though it took effect immediately, did not so operate as to terminate the existing office or impair its functions, or remove incumbents; that it transferred the power of appointment from one officer to another body of officers, and that the omission of the latter to use their authority could not be construed into a removal of the existing officers, although a new appointment by the judges of another person to the same office would necessarily have that effect. The result of his deliberations was that the officer *ad interim* was entitled to compensation if he had rendered the services contemplated. We do not think the case of *Genet agt. The Mayor*, recently decided in the court of appeals (76 N. Y., 625), affects this view of the case in any respect, and we feel bound to adhere to our judgment formerly expressed.

The judgment should be affirmed.

N. Y. SUPERIOR COURT.

ANNIE McCABE agt. WILLIAM S. FOGG *et al.*

Attorney's lien — Costs — Code of Civil Procedure, section 66.

The amendment to section 66 of the Code of Civil Procedure, passed in 1879, gives to the attorney of record, from the commencement of an action or the service of an answer containing a counter-claim, a lien upon his client's cause of action or counter-claim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after the judgment.

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But no new remedy is provided for the enforcement of the lien, and, in order to make it available in the case of a settlement before judgment, the attorney, while he need no longer prove fraud or collusion, must still go on with the litigation until judgment, which is to be perfected for cost only.

Special Term, July, 1880.

FREEDMAN, J.—Under the old Code the lien of an attorney for compensation did not exist before verdict or judgment, except on the papers in his hands. It was only in the case of a settlement privately effected between the parties with the design of defrauding the attorney that the court could, as shown in *Dietz agt. McCallum* (44 How., 493), and the cases therein referred to, insist upon the payment to him of a least the taxable costs, before granting a discontinuance or leave to serve supplemental answer showing settlement. The Code of Civil Procedure, as originally passed, did not change the law upon this point as it then stood, and *Quincy agt. Francis* (5 Abb. N. C., 286) is simply a decision to this effect. The amendment to section 66 of the Code of Civil Procedure, passed in 1879, however, gives to the attorney of record, from the commencement of an action or the service of an answer containing a counter-claim, a lien upon his client's cause of action or counter-claim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after the judgment. But no new remedy is provided for the enforcement of the lien, and in order to make it available in the case of a settlement before judgment, the attorney, while he need no longer prove fraud or collusion, must still go on with the litigation until judgment, which is to be perfected for costs only.

The motion to compel payment by a mere order must therefore be denied.

Marston agt. Hebert.

SUPREME COURT.

FELICIE C. MARSTON agt. JULIAN HEBERT.

Costs — taxation of — Code of Civil Procedure, section 3251 — Ten dollars to be taxed for each witness examined before trial under the provisions of this section.

Under the provisions of section 3251 of the Code of Civil Procedure, a party is entitled to tax ten dollars for *each* witness examined before trial.

Special Term, February, 1881.

In this action five witnesses were examined before trial, under the provisions of section 870 of the Code of Civil Procedure. On taxation of costs the clerk taxed fifty dollars for the examination of the five witnesses, taken before trial, on behalf of plaintiff.

An appeal was taken from the clerk's taxation.

S. A. Emanuel, for motion.

Stewart & Hawes, opposed.

It was claimed by counsel for the defendant that section 3251 of the Code of Civil Procedure provided for the payment of only ten dollars for the entire examination, exclusive of the question of the number of witnesses examined. It was *held*, BARRET J., that, ten dollars should be allowed for the examination of *each* witness before trial.

Achelis *et al.* agt. Kalman.

N. Y. COMMON PLEAS.

THOMAS ACHELIS, JR., *et al.*, plaintiff and respondent, agt.
CHARLES KALMAN, defendant and appellant.

Attachment — Appeal — Order denying motion to vacate an attachment appealable to the general term — Facts which are not sufficient to justify attachment — Code of Civil Procedure, sections 635, 636, 683.

Where an application is made to vacate an attachment founded only upon the papers upon which the warrant was granted, an order denying such application is appealable to the general term.

On such appeal the general term must exercise the same supervision over the motion that the judge to whom it was originally made could have done. The general term must consider as to whether there is sufficient in the papers to justify the issuing of the attachment, not whether there was jurisdiction.

Where the facts set forth in the affidavits, upon which the attachment was granted, were that the defendant purchased the goods in question August 6, 1880, on a credit of thirty days from September 15, 1880; that the goods was obtained by false and fraudulent representations; stating the negotiations which entered into the sale, the representations alleged to have been made, and that such statements were false; shows in what respect it is claimed they were false, and points out the indebtedness existing at the time; then makes a general allegation that "the defendant has assigned and disposed of his property with intent to defraud his creditors; that after purchasing said goods, the defendant shipped about one-half of them to auction houses in other cities, and sold the same at auction. After this allegation follows a general charge that the defendant, on October 12, 1880, made a general assignment, with preferences:

Held, that there was sufficient in the papers to justify an order of arrest, admitting the facts in the affidavits to be true, but there was not sufficient to justify the attachment.

Where the party made an assignment in October, the goods being bought in August, and there being preferences to creditors whom he owed, the court cannot assume from that fact that there was a fraudulent disposition of his property:

Held, further, that the attachment must be reversed, for the reason that there was no connection between the previous acts and the assignment to prove the assignment to have been made with a fraudulent intent, or to warrant that conclusion.

General Term, January, 1881.

Achelis et al. agt. Kalman.

IN this case an attachment was granted on the ground that defendant had assigned and disposed of his property with intent to defraud his creditors. Defendant moved to vacate same on plaintiff's papers, on the ground of the alleged insufficiency of the affidavits. From the order denying this motion the present appeal is taken.

Blumensteil & Hirsch, for defendant, appellant.

I. This is an action for wrongful conversion of goods, and for damages therefor. The facts constituting the alleged cause of action arise out of a purchase of the goods in question, made August 6, 1880, on a credit of thirty days from September, 15, 1880. That this merchandise was obtained by means of false and fraudulent representations. All the affidavits simply show a cause of action for fraud in contracting the debt. There are no facts alleged or shown to prove a fraudulent disposition of property, nor from which such a disposal can be legally inferred. Thus on from folio 10 to folio 14, we have the negotiations which entered into the sale. Folio 15 is occupied with the representations alleged to have been made, and that such statements were false. Folios 16 and 17 shows in what respect it is claimed they were false, and points out the indebtedness existing at the time.⁴ Then at folio 17 comes the general allegation that "the defendant has assigned and disposed of his property with intent to defraud his creditors, and the only fact alleged in that connection is (*fol.* 18) "that after (how long after is not stated) purchasing said goods the defendant shipped about one-half of the black satin so purchased to auction houses in other cities, and sold the same at auction, as appears by defendant's books of account. That such goods were of the value of about \$500." It is not shown that the sale thus made was not in the ordinary course of business; nor that they were sold below cost, or that the proceeds were diverted; nor that the transaction was concealed. On the contrary, it appears to have been spread out in the books of defendant and is for a comparatively small amount, and

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shows a disposal only of plaintiff's property. After this allegation follows a general charge that the defendant made an assignment for benefit of preferred creditors to one Reece M. Oberteuffer. This, of course, is no evidence of fraud, and the plaintiff's own affidavit shows it to be generally for the benefit of all the creditors, with preferences. It is not claimed that the persons preferred are not creditors. On the contrary, it is alleged that they are, and that defendant was indebted to them at the time stated in the amount for which they are preferred.

II. The authorities unite in holding that the affidavit must allege facts from which the court can judicially determine whether the defendant has been guilty of one of the fraudulent acts specified (*Mott* agt. *Lawrence*, 17 *How.*, 559; *Connell* agt. *Lascelles*, 20 *Wend.*, 77; *Miller* agt. *Brenkerhoff*, 4 *Denio*, 120; *O'Reilly* agt. *Friel*, 37 *How.*, 27; *Stewart* agt. *Brown*, 16 *Barb.*, 369).

III. The plaintiff seems to rely upon the general statement, unsupported by any fact, that the general assignment was made with intent to defraud creditors. This is at most a general charge based upon no evidence. But even if facts were alleged showing that this instrument was made with intent to hinder, delay and defraud creditors, and could, therefore, in a creditor's suit, be set aside, still this would not be sufficient grounds for issuing an attachment. If it be true, as alleged, that the fraudulent purchase and the assignments were part of one plan, at most these facts would present a case of constructive fraud not sufficient to authorize the granting of an attachment for fraudulent disposition of property (*Place* agt. *Miller*, 6 *Abb.* [*N. S.*], 178; *Belmont* agt. *Lane*, 22 *How.*, 365; *Denzer* agt. *Munday*, 5 *Robt.*, 636; *Scott* agt. *Sumers*, 34 *How.*, 66). Besides, we claim, even if the rule were otherwise, that there is no concealment or removal of property alleged or shown, nor any circumstances shown from which a fraudulent scheme could be inferred. There is only a general statement made, with no fact alleged to prove their truth (*Yates* agt. *North*, 44 *N. Y.*, 271).

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IV. Even admitting that there are sufficient matters stated in the affidavit showing that the fraud in the purchase and the assignment were part of a plan to cheat the plaintiff, they would only make out a cause of action for fraud and deceit, and would form no basis for a charge of fraudulent disposal of property, otherwise in every action of fraudulent conversion an attachment might issue as of course (*See in point, German Bank of London agt. Bowie Dash*, 60 *How.*, 124).

V. The assignment might, in law, be void, because the property was purchased in order to make assets for *bona fide* preferred creditors. This, however, would not prove a fraudulent disposition of property for which an attachment can issue.

VI. It not being alleged or claimed that any of the creditors preferred in the assignment have fictitious claims, in whole or in part, the defendants had a perfect right to prefer them under the laws of this state (*Archer agt. O'Brien*, 7 *Hun*, 146; *Auburn Ex. Bk. agt. Fitch*, 48 *Barb.*, 344; *Carpenter agt. Muren*, 42 *Barb.*, 300; *Leavitt agt. Blatchford*, 17 *N. Y.*, 521, 536; *Woodworth agt. Sweet*, 51 *N. Y.*, 8; *Hill agt. Northrup*, 9 *How.*, 525).

VII. That the making of a general assignment, or the threat so to do, is not sufficient to authorize an attachment is settled (*Wilson agt. Britton*, 26 *Barb.*, 562; *Dickenson agt. Benham*, 10 *Abb.*, 390; *affirmed*, 20 *How.*, 343). The order should be reversed, and attachment should be vacated, with costs.

J. A. McCrary, for plaintiffs and respondents.

I. The motion to vacate was properly denied. To sustain the attachment it was necessary only that plaintiffs should make out a *prima facie* case on two points, viz., a cause of action for the wrongful conversion of personal property, and an assignment or disposition of property by defendant with intent to defraud his creditors (*Code of Civil Pro.*, secs. 635, 636).

II. As to the existence of a cause of action for wrongful

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conversion, the averments in plaintiffs' papers are abundantly full, so much so that their sufficiency in this respect was conceded in the court below.

III. The facts and circumstances set forth in the moving papers had a legal tendency to support the charge expressly sworn to therein, and upon which the attachment was granted, viz., an assignment and disposition of property by defendant with intent to defraud his creditors (*Easton agt. Malavazi*, 7 *Daly*, 147; *Kennedy agt. Thorp*, 3 *Abb. Pr. [N. S.]*, 131; *Kennedy agt. Thorp*, 51 *N. Y.*, 134; *Place agt. Miller*, 6 *Abb. [N. S.]*, 178; *Blake agt. Bernhard*, 3 *Hun.*, 397).

IV. It was not incumbent on plaintiffs to make out a conclusive case of fraudulent intent, or to negative the possibility of an honest intent on the part of the debtor. If the fraudulent intent is a justifiable inference from the facts alleged, the attachment should not be vacated in the absence of any attempt at explanation by defendant (*Cooney agt. Whitfield*, 41 *How. Pr.*, 6). "It is not necessary that the facts stated in the affidavit should be decisive of a design on the part of the debtor to assign or dispose of his property with the intent to defraud his creditors. It is sufficient if they legally aim or tend to sustain that averment" (*Schoonmaker agt. Spencer*, 54 *N. Y.*, 366).

V. The cases in which it has been held that as preferences by debtors are permitted by law, threats to make assignments with preferences will not be accepted as evidence of intent to make a fraudulent disposition of property have no application to the present case. The distinctive feature here is the intent at the time of the purchases not to pay for the same, but to make a disposition of the property thereby acquired in fraud of the parties from whom the same was bought, by applying it exclusively to the satisfaction of the existing demands of other parties. Such a disposition of his property may be likened to an assignment with preferences in disregard of an agreement to give a particular creditor security upon the debtor's property, which, it is intimated, would entitle such

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creditor to an attachment (*See Dickerson agt. Benham*, 20 *How. Pr.*, 346).

VI. The papers show that defendant has made an assignment of all his property for the ostensible benefit of creditors, which assignment is asserted to be fraudulent. It is thus plainly before the court that, in applying for the attachment, plaintiff's purpose is to test the validity of the assignment, through a levy upon the assigned property. It is submitted that substantial justice will be done to all the parties in interest by retaining the attachment and leaving the question of the good faith of the assignment to be tried in the action which the court might reasonably assume will follow such levy of the attachment by the assignee (and which, in the present case, has been brought, and is now pending in this court) in conformity with the ruling in *Belmont agt. Lane*, (22 *How. Pr.*, 365; *opinion of ALLEN, J.*, 367). It is evident from an examination of the two opinions here reported, that ALLEN's was the prevailing opinion, and that of SUTHERLAND, J., which precedes, was a dissenting opinion. See in support of this view, *Rinchee agt. Stryker* (28 *N. Y.*, 51), where *Belmont agt. Lane* is cited as in conformity with a ruling there made, for which support can be found only in the opinion of ALLEN, J.

VII. The order appealed from should be affirmed, with costs and disbursements for printing.

PER CURIAM.—The question in regard to the appealability of the order which has been suggested by the counsel for the respondent, seems to be met by the 683d section of the Code, which is a new provision, and which did not exist in the old Code (there is an express provision in the 683d section of the Code), that an application may be made to vacate an attachment founded only upon the papers upon which the warrant was granted, if such permission is given by the Code. It cannot be but that it was intended that the motion should be made upon these papers for the purpose of ascertaining

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whether the papers presented a proper case for the issuing of an attachment, not as to whether there was such facts as would confer jurisdiction upon the officer who granted the attachment, because the right existed to have the attachment vacated upon that ground. Without this provision, it would seem to have been to allow the judge upon the motion to determine upon subsequent examination whether there was sufficient to justify the officer in granting the warrant.

In the section there is an express provision that an appeal may be taken to the general term. This order continued the attachment, and as a result, there was a right to appeal to the general term; and the general term must exercise the same supervision over the motion that the judge to whom it was originally made could have done, and it is a review of his judgment upon these papers, for which the appeal is provided, and as a result the general term must consider as to whether there is sufficient in the papers to justify the issuing of the attachment; not whether there was jurisdiction. Therefore we are of the opinion that the appeal must be maintained.

The next question is whether there was sufficient in the papers to justify the attachment. That there was sufficient to justify an order of arrest, will undoubtedly be conceded by the counsel for the defendant, admitting the facts in the affidavit to be true, but there was not sufficient to justify the attachment. The fact that the defendant sent these identical goods to auction under the position which the plaintiff occupies, made a fraudulent disposition of the plaintiff's property. The plaintiff claims he rescinded the sale, and they sued for the property, and consequently that element is eliminated from the case. Then, where the party made an assignment in October, the goods being bought in August, and there being preferences to creditors whom he owed, how can the court assume from that fact, and that seems to be the solitary fact, that there was a fraudulent disposition of his property?

We do not think it is sufficient to justify it.

Therefore, we think the attachment must be reversed, for

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the reason that there was no connection between the previous acts and the assignment sufficient to prove the assignment to have been made with a fraudulent intent or to warrant that conclusion.

SUPREME COURT.

CHARLES A. CLEGG agt. THE AMERICAN NEWSPAPER UNION,
WILLIAM E. CRAMER, ANDREW J. AIKENS, JOHN F. CRAMER
and others.

Joint and several liability — Former common-law rule changed by Code of Civil Procedure, section 1204 — Pleading by answer, a several liability — Demurrer to answer — Counter-claims — Advertising contracts.

Where in an action for damages alleged to arise from the breach of a written contract to do advertising, a joint liability is charged against numerous defendants, among whom are C., A. and C., copartners, and the latter defendants answer jointly, admitting that they had dealings with and did advertising for plaintiff, but aver that all such dealings were several as to them and not joint with the other defendants, and thereupon such copartners set up counter-claims in their answer, to which counter-claims plaintiff demurs on the ground that all the defendants in this action are sued on a joint liability, that the said counter-claims are alleged in favor of said defendants separately, and that as between the said defendants and the plaintiff a separate judgment in this action cannot be had:

Held, that a demurrer to such an answer is ill, and that defendants are entitled to judgment for the amount due under their counter-claims.

Held, also, that plaintiff's position would have been well taken under the former common-law rule; but that the Code of Procedure has radically changed the former rule, and that now under the new Code, section 1204, judgment may be given for or against one or more defendants; that the ultimate rights of parties on the same side, as between themselves, may be determined, and a defendant granted any affirmative relief to which he is entitled.

New York Special Term, November, 1880.

THIS action is brought by Charles A. Clegg against eleven defendants — five corporations and six natural persons.

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As to the complaint : The complaint alleges that the defendants, William E. Cramer, Andrew J. Aikens and John F. Cramer, arê, and were at the several times therein mentioned, copartners, doing business in the city of Milwaukee and elsewhere under the firm name of Cramer, Aikens & Cramer, and as such were and are proprietors and managers of a list of newspapers called "The Milwaukee Newspaper Union." The complaint then proceeded to declare the making of various agreements at different times between plaintiff and different defendants, as follows :

(1.) On the 3d day of May, 1876, by the last-named defendants, jointly and severally engaged, an agreement with plaintiff to advertise for an indefinite time, for sums and rates which the complainant fails to disclose, and in such papers as plaintiff might designate through defendant Foster.

(2.) Then, after disagreements, disputes, and an alleged admission of a breach, a compromise agreement between plaintiff and defendant Aikens is set forth, relating, first, to a contract for \$50,000 (gross) worth of space made with him ; second, to a guaranty respecting low rates ; third, providing for additional space conditionally. Other provisions also appear, including one as to contracts involving A. N. Kellogg's lists.

(3.) After something had been done under the former agreements, another agreement is alleged about January 2, 1877, in which defendants Beals, Foster and Rowell are said to become jointly and severally interested with the other defendants, and to guarantee to plaintiff the performance of all the previous contracts of the other defendants.

As to the answer : First. The answer denies the allegations of the complaint except as afterwards specifically admitted or controverted ; such denial, therefore, covers the alleged relations of the parties as described in the complaint. Second. The answer admits that the plaintiff is an advertising agent ; that defendants are copartners under the firm name of Cramer, Aikens & Cramer ; that they are proprietors of space in the Milwaukee Newspaper Union lists ; that they did advertising

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for plaintiff, and that plaintiff paid them money. Third. But the answer avers that these defendants, as such copartners and proprietors, and in no other capacity, contracted with plaintiff; and that the work done and money paid were not as alleged in the amended complaint, but as averred in the answer. The agreements, together with the advertising done and payments made under them, are then set forth in detail in the answer, showing large sums due these defendants, for which they demand judgment against plaintiff.

As to the demurrer: The demurrer is put upon the sole ground that the complaint alleges a joint liability in respect to all the defendants, while the counter-claims are pleaded on behalf of the three answering defendants only; and that a separate judgment, between plaintiff and defendants Cramer, Aikens & Cramer, cannot be had.

S. Hanford (*Wm. H. O'Dwyer*, attorney), for plaintiff.

I. The counter-claims are inadmissible. (a) The liability sued on is joint only, and the rules to be applied are those relating to suits against joint debtors. These rules forbid the allowance of any such counter-claims as those in question (*Perry agt. Chester*, 53 N. Y., 240). The Code has made no change in these rules (*Bridge agt. Payson*, 5 *Sandf. Sup. Ct.*, 210; *Mynderse agt. Snook*, 1 *Lans.*, 489; *Speyers agt. Fish*, 3 *Hun*, 706). (b) The language of the Code (*sec.* 501) ought to preclude any question of the untenability of the defendants' position. None of the authorities have construed this section to mean, that in a suit to enforce a joint liability, the plaintiff could be called upon to try one hundred and fifty different causes of actions existing in favor of a portion of the defendants individually. If this construction prevailed, a party suing the association known as Adams Express Company for a breach of contract might be called upon to try counter-claims set up by every one of the two or three hundred individual shareholders in that partnership association. Such a result would, as in this instance, be tantamount to a dismissal of the complaint. To make the contention of the

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defendants appear still more ridiculous it is only necessary to follow it to its legitimate result, and assume that the claims of both the plaintiff and all the defendants are established. What would be the character of the judgment or judgments rendered? The late chief justice CHURCH said, in a similar case: "The action in this case was upon a joint, and not a joint and several liability, and a several judgment in such a case is not proper" (*Perry agt. Chester, id.*). If the defendants could set up their individual claims to defeat or reduce a joint recovery *a fortiori*, the plaintiff would be entitled to join in his complaint, in the first instance, causes of action joint against all the defendants, with separate causes of action against a portion or all of the defendants individually. (c) The true rule to be applied is indicated by the court of appeals in the case of *Taylor agt. Root* (4 *Keyes*, 343), where the precise question in controversy here was involved, although the position of the parties relatively to each other was reversed. There the court says: "The plaintiff's claim is undoubtedly correct, that where the cause of action is strictly joint, and the recovery, if had, is for the joint benefit of the plaintiffs; as for example, where the plaintiffs are partners, asserting the right of the copartnership firm, as such, to recover, and like cases—in which it would be wholly incompetent for the defendants to enter into any attempt to state the accounts between the plaintiffs, to ascertain what portion of the recovery would ultimately inure to the benefit of each—the defendants could not set off or counter-claim the individual debt of either plaintiff to defeat or reduce a joint recovery; nor here could the separate or individual debt of either be set up as a set-off or counter-claim to affect the several right of the other plaintiffs to an accounting, or to defeat or diminish their recovery of the several amount of the share due to each of them." To same effect *Perry agt. Chester (id. 249)*. More recently, in *Baldwin agt. Briggs* (2 *Abb. N. C.*, 216), the superior court sustained a demurrer to a counter-claim interposed by one of

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only two joint defendants. See, also, *Hurlbut* agt. *Post* (1 *Bosw.*, 28). (d) The only authorities seemingly sanctioning a different rule from that last referred to will be found on examination to be those where, from the nature of the action, a several judgment might be had against each defendant. Of this character are *Barthgate* agt. *Haskin* (59 *N. Y.*, 533). But no one could pretend that in this action the plaintiff could have a several judgment against any one defendant. The case of *Parsons* agt. *Nash* (8 *How.*, 454) has often been treated by both bench and bar as a strong case in support of the doctrine contended for by the defendants. But it really falls far short of being entitled to any such authority (*Myn-dorse* agt. *Snook*, *id.*; *Perry* agt. *Chester*, *id.*). In *Peabody* agt. *Bloomer* (3 *Abb. Pr.*, at page 360) judge WOODRUFF, in the superior court, after referring to *Parsons* agt. *Nash*, held, "that to an action against several joint debtors for a debt due by them as copartners, one of them cannot avail himself, either by way of set-off or counter-claim, of such a defense.

II. The demurrer should be sustained.

Edward C. Ripley, attorney for defendant Aikens.

Joseph S. Auerbach, attorney for defendants Cramer.

Chauncey B. Ripley, of counsel for defendant Aikens, and *John K. Porter*, of counsel for defendants Cramer, in opposition to the demurrer, and in support of the answer, urged the points following:

I. Plaintiff's sole ground of demurrer is "that the counter-claims are not of the character specified in section 501 of the Code of Civil Procedure, in this: That all the defendants in this action are sued on a joint liability; that the counter-claims are alleged in favor of the said defendant(s) separately, and that as between the said defendant(s) and the plaintiff a separate judgment may not be had in this action." This ground of demurrer is not now tenable, for it is based upon a rule that where the complaint alleges a joint liability against

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a number of defendants, there can be no judgment against any number less than the whole, because all are sued on a joint liability; in other words, that the judgment in such case depends upon the complaint alone. But the new procedure has abrogated that rule, and now judgment may be given for or against one or more defendants sued jointly, whenever the issues raised by the pleadings or the proofs adduced warrant it; that is, if some of the defendants are liable and others not, the plaintiff may have judgment against such as are shown to be liable, and as to those against whom no liability is shown, the complaint will be dismissed, while counter-claims become available in favor of those defendants between whom and the plaintiff a separate judgment is possible. This is not a case where the alleged joint relation is admitted, and where no issue is raised respecting it. On the contrary, the answer controverts it and avers that all the relations between plaintiff and defendants Cramer, Aikens & Cramer were several to the latter, and that all their dealings were had on behalf of their firm alone and as proprietors of the Milwaukee Newspaper Union, and in no other capacity. If this be so, then a separate judgment may be had in this action between plaintiff and these defendants by the express provisions of the Code, and the cases adjudicated thereunder.

(1.) As to a separate judgment: "The Code has modified the general common-law rule, that in an action upon an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action," so that now, under the new procedure, "judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side as between themselves; and it may grant to a defendant any affirmative relief to which he is entitled; while the plaintiff is nonsuited as to those who are not liable" (*Code Pro.*, sec. 274; *Code Civ. Pro.*, sec. 1204; *McIntosh* agt. *Ensign*, 28 N. Y., 169). (2.) As to the availability of the counter-claims: The counter-claims become available to

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these defendants as a matter of pleading the moment a separate judgment is shown possible under the issues raised. Two sets of issues are uniformly involved when a counter-claim is pleaded in the answer. In such case, no matter what be the form of action, whether legal or equitable, if plaintiff allege a joint obligation as to defendants, any number of them may unite in a separate answer, controvert the allegations of the complaint, aver a several contract between plaintiff and themselves, and as to that set up a counter-claim. That a joint judgment is also possible under plaintiff's theory does not exclude the allowance of the counter-claims as a matter of pleading. Defendants, equally with the plaintiff, are entitled to a trial of the issues raised by their own pleading; the court will determine the ultimate rights of the parties and grant any relief, affirmative or otherwise, which the proofs may justify. In actions alleging a joint liability, and under the sections of the Codes above referred to, the general terms of this court and the court of appeals have held that "the defendant, upon showing that one of several plaintiffs is the sole party in interest, may avail himself of a set-off (counter-claim) in all respects as if the action had been brought in the name of such plaintiff alone; that where several persons are made defendants, as upon a joint contract, and the plaintiff so declares in his complaint, but the proof shows that in point of fact only a portion of the defendants made the contract, the plaintiff can recover against such defendants as in fact were liable. That it does not now depend upon the allegations in the complaint as to the joint liability of all the defendants, but upon the fact whether they are all liable; and if some are liable and others not, the plaintiff may have judgment against such as the evidence showed to be liable."

I. No objection to the counter-claims is specified in the demurrer, except the one already considered; none is, therefore, available on this hearing (*Code Civ. Pro.*, sec. 496).

II. Plaintiff's complaint is defective; and having himself first committed errors in pleading, he cannot prevail on this

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demurrer, even though the answer were insufficient *per se* (*People* agt. *Booth*, 32 *N. Y.*, 397).

IV. There should be judgment for defendants overruling plaintiff's demurrer with costs.

BEACH, *J.*—The complaint is for damages from breach of a written contract, alleging a joint liability of numerous defendants, among whom are Cramer, Aikens & Cramer, to whose answer the plaintiff demurs. They admit the contract, aver it to be several, not joint, pleading counter-claims existing in their favor against the plaintiff. The demurrer to this answer rests upon the ground that averment of joint liability precludes individual counter-claims. This position would have been well taken under the former common-law rule, where, in an action upon a claimed joint liability of the defendants, the recovery must have been against all or none. The Code of Procedure now provides that judgment may be given for or against one or more defendants, the ultimate rights of parties on the same side, as between themselves may be determined, and a defendant be granted any affirmative relief to which he is entitled (*Code Civ. Pro.*, sec. 1204). The former rule has thus been radically changed. Should it appear on the trial of this action that the defendants Cramer, Aikens & Cramer alone were liable, the plaintiff would be entitled to a judgment against them, while the complaint would be dismissed as to the other defendants. These defendants in their answer deny joint liability with others, averring it to be several, if any exists. They are entitled to a trial of this issue, and if successful should be allowed to urge their counter-claims (*McIntosh* agt. *Ensign*, 28 *N. Y. R.*, 169). The authorities referred to by plaintiff's counsel are those of cases where the actions were founded upon liability conceded to be joint, or with no issue made upon that subject. Such are *Perry* agt. *Chester* (53 *N. Y. R.*, 240), and the part quoted of the opinion in *Taylor* agt. *Root* (4 *Keyes*, 335).

Judgment for the defendants on demurrer, with costs.

Feerick agt. Conner.

N. Y. COMMON PLEAS.

PATRICK FEERICK, plaintiff and appellant, agt. WILLIAM C. CONNER, as late sheriff, defendant and respondent.

Sheriff—Escape—Liability of outgoing sheriff for failure to deliver prisoner to his successor—Jail limits.

An outgoing sheriff cannot be held liable for failure to deliver to his successor, or for the escape of a prisoner held upon execution against the person, who was in custody of such outgoing sheriff, confined within the jail limits, where no certificate of election is shown to have been served by the incoming sheriff upon the outgoing sheriff, because until such service the powers of the outgoing sheriff, as to prisoners in his custody, remain unchanged; and therefore there could be no escape so long as the prisoner was in actual custody, and had not left the jail limits.

General Term, March, 1881.

THE plaintiff commenced in April, 1877, this action. In his complaint he alleges the recovery of a judgment in his favor against one John O'Grady, in October, 1874, the issuing of an execution against the property of the defendant and its return unsatisfied, the issuing of an execution in June, 1876, against the person of said O'Grady, his arrest by the sheriff prior to the 1st of January, 1877, the expiration of the term of office of the defendant on the 1st of January, 1877, the election of Bernard Reilly as sheriff in place of the defendant, the service upon defendant on the 2d of January, 1877, of a certificate of the clerk of the city and county of New York, under his official seal, certifying that the said Bernard Reilly had qualified as such new sheriff and given the security as required by law, the failure of the defendant within ten days after the service on him of said certificate to deliver to his successor, the new sheriff, the said John O'Grady, who then remained in custody of the said defendant, confined within the liberties of the jail of the city and county of New York.

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The answer of the defendant put in issue all these allegations of the complaint with the exception of admitting the arrest of the defendant. The evidence in the case showed the recovery of the judgment, the issuance of an execution against the property, the issuance of an execution against the person, the arrest of the defendant, and that the defendant turned over the jail and the prisoners actually confined within its walls to Mr. Reilly, the incoming sheriff, and that O'Grady was never transferred by the defendant to Reilly, as sheriff.

Upon the trial of this action the complaint was dismissed, and from the judgment thereupon entered this appeal is taken.

E. P. Wilder, for appellant.

H. B. Bookstaver, for respondent.

VAN BRUNT, *J.* — This action is one which is entirely technical in its character and is a right given expressly by statute. The theory under which the statute proceeds is that within ten days after the certificate of election by an incoming sheriff is served on the outgoing sheriff, all powers of the outgoing sheriff cease and determine with the exception of completing the execution of process partially executed. It necessarily follows that the power of the outgoing sheriff to retain in his custody or to arrest any prisoners by virtue of any process terminates after the ten days have expired from the service of the said certificate. Therefore as to the prisoners who have not been actually transferred to the new sheriff, there is no officer who has the right to restrain them of their liberty, and they are in the eye of the law at large. The new sheriff has no control over the prisoner, because he has never been transferred to him. The old sheriff cannot restrain the prisoner of his liberty because after the ten days the old sheriff has lost all the powers appertaining to his office.

The plaintiff in his complaint in this action has alleged that

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because within ten days after the service of the certificate of the election of the new sheriff, the old sheriff has failed to transfer the prisoner, he has a right under the statute to maintain this action. The evidence entirely fails to establish this cause of action, because no certificate has ever been served by the incoming sheriff upon the outgoing sheriff. It is to be observed that the sheriff is not bound to confine at all prisoners taken upon execution, and that he has a right to allow a prisoner taken upon execution, the limits without any bond, and all the liability that he incurs is that the prisoner shall not leave the jail limits. It would be no escape if the sheriff should confine a prisoner elsewhere than in the jail, as long as he was within the jail limits, or that he had allowed him to go upon the limits without a bond, and he would be just as much, in either of those cases, in the custody of the sheriff as though he was actually confined within the four walls of the jail. As a consequence, the fact that the prisoner is not found within the four walls of the jail at the time of this transfer by the outgoing sheriff to the incoming sheriff is no evidence whatever of an escape. Therefore, the facts proven upon the trial of this cause do not show that there has been an escape, or that the authority of the outgoing sheriff, as to any prisoners upon the limits, has ceased and determined by reason of the service of the certificate required by law.

In the case of *Hempstead* agt. *Weed* (20 *Johnson*, 73) the right of the old sheriff to retain the custody of prisoners not turned over to the successor is expressly recognized. It is true that that case was decided prior to the revision of the statutes, but there is little difference in principle between the certificate of discharge and the service of the notice before mentioned. The only difference between the two cases being that in the one case the outgoing sheriff is the actor and in the other case the incoming sheriff performs the duty. In the case of *Smallman* agt. *Lanes* (2 *Leonard*, 54) it was expressly held that there could be no escape, so long as the prisoner was in actual custody and not at large, and it was said by one of the justices

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that it is an escape in the old sheriff as soon as his authority is determined and the prisoner not delivered.

In the case at bar there has been no action taken which has terminated the authority of the outgoing sheriff. In the case of *Partridge* agt. *Westervelt* (13 *Weed*, 504) the same principle is recognized, because in that case it is said that the common law considered the prisoners in the custody of the old sheriff until assigned to the new, and the Revised Statutes retain the same principle.

In the case of *Hynes* agt. *Doubleday* (21 *Wend.*, 227) it is expressly stated that the powers of the old sheriff in relation to all prisoners in his custody does not determine with the termination of his term of office, but ceases only within ten days after the service of a certificate that the new sheriff had entered upon the duties of his office. It would, therefore, seem to be established, both by the statute and authority, that until the certificate is served by the incoming sheriff upon the outgoing sheriff the powers of the outgoing sheriff, as to prisoners in his custody, remain unchanged, and that the fact that he has turned over some prisoners to the incoming sheriff does not affect his powers as to the custody of prisoners not transferred is expressly recognized in the case of *Smallman* agt. *Lanes* (*supra*).

I think, therefore, that the judgment of the court below was entirely right, and that no action could be maintained upon the facts established upon the trial of this action.

The judgment must therefore be affirmed, with costs.

Checkley agt. Providence and Stonington Steamship Company.

N. Y. SUPERIOR COURT.

LILY MAY CHECKLEY, by guardian, &c., agt. THE PROVIDENCE
AND STONINGTON STEAMSHIP COMPANY.

*Shipping — Shipowners' liability for loss — Act of congress, 1851 — 9 Statutes
at Large, 635 — Limitation of liability.*

Where the loss is caused by the owners' design or neglect, or occurs with his privity or knowledge, a plaintiff may proceed in the state courts, notwithstanding the pendency of proceedings in the United States district court; but he proceeds at the risk of wholly failing in the action if he should fail to bring his case within one of the exceptions.

Special Term, July, 1880.

William P. Dixon, for motion.

G. S. P. Stillman, opposed.

FREEDMAN, J. — This is a motion by the defendant, as owners of the steamship Narragansett, sunk by a collision with another steamship also belonging to the defendant, to stay plaintiff's proceedings in the action until the final judgment in the proceedings now pending in the district court of the United State for the southern district of New York for a limitation and determination of defendant's liability by reason of the losses arising out of the collision. This proceeding has been instituted under the act of congress, passed March 3, 1851. By the common as well as the civil law the liability of a shipowner was unlimited although the loss occurred without his personal wrong. By the maritime law of modern Europe the owner is liable only to the extent of his interest in the ship, if personally free from blame. With the view of conforming our law upon this point, as far as deemed practicable to such maritime law, congress passed the act of 1851, limiting the liability of shipowners, with certain exceptions (9 *Statute at Large*, 635). The exceptions are when the loss is

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caused by the owner's design or neglect, or occurs with his privity or knowledge. In these exceptional instances his common-law liability remains intact, and he is liable for the whole loss. The plaintiff in any such exceptional case may proceed in the state courts, notwithstanding the pending of the proceedings in the United States district court, but he proceeds at the risk of wholly failing in the action if he should fail to bring his case within one of the exceptions. This has been expressly decided by the court of appeals in *Knowlton et al. agt. The Providence and New York Steamship Co.* (53 N. Y., 76). For the foregoing reasons, and no complaint having yet been served, it is not necessary to determine on this motion whether the limited liability act covers actions for personal injuries as well as actions for loss of cargo. Defendant's motion must be denied, with ten dollars costs, but without prejudice to a renewal thereof upon payment of such costs, if the plaintiff should fail to base the complaint upon one or more of the exceptions made by the act of congress.

SUPREME COURT.

ELLIS S. PRICE, as surviving executor and trustee, under the last will, &c., of GEORGE J. PRICE, deceased, agt. TIMOTHY G. BROWN, individually and as executor of the last will, &c., of EPHRAIM D. BROWN, deceased.

Executor — right to call his co-executor to account in a suit in equity — Foreign executor amenable to like authority — Complaint — Parties — Demurrer.

The plaintiff, as surviving executor of George J. Price, sues defendant individually, and as sole acting executor of his father (who with plaintiff was co-executor of said Price), for an accounting and damages and other relief, alleging that defendant's testator, who, as such co-executor, took the exclusive control and management of Price's estate, committed various wrongful acts, set forth, in relation thereto, imperiling it; charging misconduct in relation to said estate on the part of defendant

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since the death of his father, the books and vouchers in relation to said estate having then come into his possession; and setting up that the widow and children of plaintiff's testator, to whom said testator devised the income of his estate during his children's minority, the principal to be then paid to them, are still living and of full age:

Held, overruling demurrer to the complaint, that an executor not only has the right to call his co-executor to account in a suit in equity, but a foreign executor may be held amenable to like authority to prevent either a complete or partial failure of justice, and to maintain and enforce a trust; defendant being accountable for his testator's misconduct to the extent of the latter's assets in his hands.

The complaint states a sufficient cause of action under section 484 of the Code.

The case not being one for a final accounting, the widow and devisees of Price are not necessary parties, and if necessary they may be brought in.

As the causes of action stated in the complaint all arise out of one transaction—the alleged breach of trust of defendant's testator—they have not been improperly united.

In Equity, March, 1881.

George W. Stephens, for demurrant.

Ira B. Wheeler, opposed.

LARREMORE, *J.*—The complaint alleges that George J. Price, by his will, devised all his estate, real and personal, to his executors, the plaintiff and the said Ephraim D. Brown, and the survivor of them, in trust to sell or mortgage the same at discretion, to invest the proceeds thereof, and to rent any unsold real estate. The rents, issues and profits, and so much of the principal as may be necessary, is directed to be paid to the testator's wife during her natural life, for her support and that of her children until they become of age, when each child is to receive its full share.

That letters testamentary were issued to plaintiff and said Brown, June 22, 1862, by the surrogate of Queens county, New York. That Brown took upon himself the entire and exclusive control and management of the estate; that plaintiff has had no active participation therein; and that the widow and

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children of Price are still living and of full age. That Brown has received all the proceeds of sales of the testator's estate, and all the rents and profits thereof in his lifetime, and that plaintiff has had no information or account concerning the management thereof. That such management appears to have been careless, negligent and improvident, so that the estate is imperiled, and plaintiff, as the survivor of Brown, seeks information as to the condition of the estate, both general and in detail.

It is further alleged that Brown died March 8, 1880, leaving a will which was probated March 29, 1880, in Hudson, New Jersey, whereby he devised all his estate, real and personal, to his wife, and appoints her and his son Timothy G. Brown, the defendant, executors, with full power of sale. The defendant alone qualified; that all the books, papers and vouchers of his father, as executor and trustee of the will of Geo. J. Price, are now in defendant's possession, and that he has never rendered any account thereof.

For a further cause of action it is alleged that Ephraim D. Brown wrongfully and negligently allowed the taxes and assessments to accumulate on said real estate, although the income therefrom was sufficient to pay the same. That plaintiff has paid some portion of said taxes, and that Brown redeemed part of said estate from tax and assessment sales with trust funds of the estate, and took assignments thereof in his individual name, which are now in defendant's possession.

For a further cause of action it is alleged that plaintiff sought to obtain a loan on his father's estate to pay taxes and make repairs thereon, but could not on account of the wrongful, willful and careless withholding by defendant of said tax and assessment leases and his refusal to assign the same, whereby plaintiff is unable to perform his duty in the premises. That by reason of such wrongful acts of said Ephraim D. Brown and the defendant's refusal and misconduct, the estate has been injured and damaged, which injury and damage

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will be augmented and continued by defendant's alleged misconduct. Wherefore plaintiff demands that the defendant account both as executor of his father as to all matters and proceedings connected with the estate of Geo. J. Price; that he deliver over all books, papers and other things connected therewith in his possession or under his control; that the damages sustained by the wrongful acts and misconduct be ascertained, and that plaintiff have judgment therefor; and also a judgment against the defendant individually for his misconduct and violation of duty. That an interlocutory decree may be entered for the delivery of all papers belonging to the estate, and final judgment be given for general relief.

The defendant demurs to the complaint separately, in his representative and in his individual capacity: 1st. That the court has no jurisdiction of him as an executor. 2d. That no sufficient cause of action is stated. 3d. Defect of parties, *i. e.*, that the widow and devisees of Price should have been joined as parties defendants. 4th. Both individually and as executor, that several causes of action have been improperly united.

Let us consider the points raised in their order of statement:

First. As to jurisdiction. It is contended that the court has no jurisdiction in an action between executors, especially where the defendant is a foreign executor. The authorities cited to sustain this proposition have reference chiefly to actions at law. Nothing is found to impair the right of one executor to call his co-executor to account in a suit in equity. That this may be done as between executors has been settled by the case of *Wood agt. Brown* (34 *N. Y.*, 337), and it seems to be unquestioned that a foreign executor may be held amenable to like authority to prevent either a complete or partial failure of justice, and to maintain and enforce a trust (*In re Webb*, 18 *N. Y.*—; 11 *Hun*, 124; *Brown agt. Brown*, 1 *Barb. Ch.*, 189; *Morsell agt. Dickey*, 1 *John. Lib.*, 154; *Story Confl. of Laws*, secs. 513 and 514; *McNamara agt.*

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Dwyer, 7 *Paige*, 236). The defendant's testator was an executor appointed in the state of New York. The trust created by the will under which he acted relates mainly to property in that state, and it seems both just and equitable that his responsibility should there be determined. There can be no doubt that the original executor and trustee, Ephraim D. Brown, could have been held to account in equity (*Smith* agt. *Lawrence*, 11 *Paige*, 208; *Williams on Executors*, vol. 2, 1625; *Wood* agt. *Brown*, *supra*; *McGregor* agt. *McGregor*, 35 *N. Y.*, 218). The case of *Burt* agt. *Burt* (41 *N. Y.*, 46) is distinguishable in principle, for it did not there appear that the executor had been guilty of wrong conduct and mismanagement in the execution of his trust, or that the estate was in danger. The defendant as the legal representative of Ephraim D. Brown, the trustee, is accountable, to the extent of assets in his hands, for the former's misconduct and breach of trust (*Williams on Executors*, vol. 2, 1819; *Redfield on Wills*, vol. 3, 240, 299; *Foster* agt. *Wilbur*, 1 *Paige*, 537).

Second. That no sufficient cause of action is stated. Section 484 of the Code of Civil Procedure provides that a plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover (*inter alia*) upon claims against a trustee by virtue of a contract, or by operation of law, or upon claims arising out of the same transactions connected with the same subject of action, if they are consistent with each other and affect all the parties to the action. The tendency of our practice has been to avoid circuity of actions, and to encourage liberality in pleading. If the facts set forth in the complaint entitle the plaintiff to any relief, legal or equitable, his action will not fail (*Bradley* agt. *Aldrich*, 40 *N. Y.*, 512; *Hale* agt. *Omaha National Bank*, 49 *N. Y.*, 626; *Steinberger* agt. *McGovern*, 56 *N. Y.*, 12; *Margraf* agt. *Muir*, 57 *N. Y.*, 159; *Wheelock* agt. *See*, 74 *N. Y.*, 500). In face of these decisions I hesitate

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to hold, on a demurrer which impliedly admits all the facts alleged in the complaint, that the plaintiff will not be entitled to some relief upon proper proof thereof.

Third. Defect of parties. This is not a case of a final accounting, and the widow and devisees of Price are not necessary parties (*Wood agt. Brown*, 34 *N. Y.*, 337), and, if necessary, they may be brought in (*Sherman agt. Parish*, 53 *N. Y.*, 483).

Fourth. That several causes of action have been improperly united. Courts of equity have concurrent jurisdiction with surrogates in matters of accounting (*Wood agt. Brown*). The causes of action stated in the complaint all arise out of the same transaction, viz., the alleged breach of trust of defendant's testator. Whether or not the defendant is individually liable should be determined on the trial. If the plaintiff has asked for more relief than he is entitled to, that is no ground of demurrer.

There should be judgment for the plaintiff on the demurrer, with leave to defendant to answer on payment of costs.

SUPREME COURT.

WILLIAM RYLE agt. ALBERT FALK.

Sheriff—entitled to his poundage for taking a defendant into custody on an execution against the person, although the execution be not paid.

A sheriff who has taken a defendant into custody on an execution against the person, is entitled to his poundage, although the execution be not in fact paid.

Such defendant is not entitled to his discharge upon plaintiff's consent until either he or the plaintiff shall have paid such poundage.

First Department, General Term, March, 1881.

Before DAVIS, P. J., and BRADY, J.

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APPEAL from order of special term, taxing poundage upon an execution against the body in favor of the late sheriff Reilly.

William G. Wilson, for plaintiff.

J. D. Quincy, for defendant.

A. Goodwin, for sheriff.

DAVIS, *P. J.*—The defendant, Albert Falk, was arrested upon an execution against the body, and held by the late sheriff pursuant to the exigency of the writ. On the expiration of the sheriff's term his custody was transferred to the incoming sheriff, and he is still held under the execution and arrest. The plaintiff in the action, while the defendant remained in such custody, directed and delivered to the late sheriff and to the present sheriff a paper entitled in the action, in the following form :

"You are hereby authorized and requested to release and discharge from imprisonment, the defendant Albert Falk, in the above entitled actions, upon his paying and satisfying all your legal fees, charges and expenses under and upon the orders of arrest and execution herein, under which the defendant Albert Falk is now in your custody.—Dated New York, May 21, 1880."

It seems to be well settled in this state, upon authority, that upon the arrest under a body execution the judgment is satisfied so long as the defendant continues in custody under the arrest; and the sheriff is entitled to his poundage on the execution whenever the defendant is discharged by the payment of the judgment or under the act for the relief of debtors, or by the consent of the plaintiff (*Adams agt. Hopkins*, 5 *Johns.*, 252; *Scott agt. Shaw*, 13 *id.*, 378; *Campbell agt. Cothren*, 56 *N. Y.*, 279; *Cooper agt. Bigelow*, 1 *Cow.*, 56; *Chapman agt. Hall*, 11 *Wend.*, 41; *Koenig agt. Stoeckel*, 58 *N. Y.*, 475).

In this case the defendant has not been discharged by pay-

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ment, nor under any legal proceedings, nor has he been discharged at all by the plaintiff's consent, except upon the condition expressed in the instrument above quoted, to wit, upon his paying and satisfying the sheriff's legal fees, charges and expenses upon the execution under which he is held in custody.

A sheriff who has taken a defendant in custody on an execution against the person has incurred all the risks and liabilities that attend the execution of the process in that form. He is ready and willing to perform, and is performing his duties in respect of the process, according to its exigency. An absolute discharge of the defendant by satisfaction of the judgment, or by an unqualified direction of the plaintiff would undoubtedly leave the plaintiff liable to the sheriff for his poundage upon the execution, such poundage being the sheriff's legal fees. The defendant has no right to demand, therefore, that he is entitled to be relieved from custody without such payment. It is, however, insisted that under the Code the rules and provisions that govern executions against the body under the former statute have been changed, so that now the sheriff is entitled to no fees unless the judgment on which the process issued has actually been collected by him. Our examination of the Code leads us to no such conclusion. The change in the form of the execution does not change its substance. The effect of the arrest of the defendant under such a writ still operates as a satisfaction so long as such custody continues, and the fees of the sheriff and his right to poundage do not seem to have been changed or affected by the provisions of the Code referred to.

We are therefore of opinion that the taxation of costs by the court below was correct and that the appellant is not entitled to his discharge until either he or the plaintiff shall have paid the poundage as taxed in favor of the sheriff.

The order should be affirmed, with ten dollars costs besides disbursements.

BRADY, J., concurs.

DIGEST

CONTAINING THE WHOLE OF

60 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 21 AND 22 HUN, AND 79 AND 80 N. Y. REPORTS.

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ACTION.

See SHERIFF.

Masten agt. Webb, ante, 302.

1. Where a barge is towed by a steamboat, the steamboat is the superior mind, and the captain of the barge cannot prevent the pilot of the steamboat from going out. The assent or dissent of such a captain as to proceeding on the voyage is scarcely material. (*Davidson agt. Holden, ante, 327.*)

2. If the contractor or freighter is negligent in providing an unseaworthy barge, the shipper may, nevertheless, either sue him or his sub-contractors (the owners of the steamboat), in case of loss by stress of weather, occasioned as well through the negligence of the sub-contractors as through the inherent unsoundness of the barge. (*Id.*)

3. The owners of the steamboat are responsible to the shippers for negligence in going out in stormy weather, and thus occasioning loss of cargo, although there was no privity of contract between them. (*Id.*)

4. The overloading of the barge, or the barge's unseaworthiness being evident to, or known of by, defendant's pilot, are no defense here. (*Id.*)

ADMISSION.

1. Where an admission in a pleading is coupled with an affirmative allegation, the adverse party cannot rely upon the admission unless he accept it as modified by the accompanying allegation. (*Vanderbilt agt. Schreyer, 21 Hun, 557.*)

AFFIDAVIT.

See ATTACHMENT.

Ellison agt. Bernstein, ante, 145.

See EXAMINATION OF PARTIES BEFORE TRIAL.

McCoon agt. White, ante, 149.

1. Used on a second application for the examination of a defendant in supplementary proceedings, should state that one examination has already been had. (*See Grocers' Bank agt. Bayard, 21 Hun, 203.*)

AMENDMENT.

1. When a pleading should be amended to conform to the proofs. (Code of Civil Procedure, sections 539, 540, 722, 723). (*See Lefler agt. Sherwood, 21 Hun, 573.*)

2. Power of the court to allow a judgment to be entered against a

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party after his death—when an application to amend a judgment should be denied on account of the laches of the applicant. (*See Grant* agt. *Griswold*, 21 *Hun*, 509.)

3. A general term of the supreme court has power to amend its record, after an appeal to this court, by inserting in an order of reversal that its decision was made upon questions of fact. (*Guernsey* agt. *Miller*, 80 *N. Y.*, 181.)

4. The complaint in an action upon a policy of life insurance alleged that proper proofs were furnished; on the trial, which was before a referee, he gave the plaintiff leave to amend the complaint, by alleging a waiver of the requirement as to proofs. This was granted upon terms, among others, that plaintiff should pay costs, which were accordingly paid, and the amendment made:

Held, that it was within the power of the referee to allow the amendment; and, if otherwise, defendant, by accepting the costs, was precluded from raising the objection. (*Grattan* agt. *Met. L. Ins. Co.*, 80 *N. Y.*, 281.)

5. An order for services of summons by publication, had the caption of a special term order, and there was a direction upon it to enter; it was, in fact, made by a judge at his chambers:

Held, that the court had the power to allow the order to be amended after it had been acted upon, by striking out the caption and the direction to enter, and that its order allowing such amendment was not appealable. (*Mojarieta* agt. *Saenz*, 80 *N. Y.*, 553.)

ANSWER.

1. The plaintiff's attorney, when defendant's time to answer would have expired in five days, gave a written stipulation extending the time to answer twenty days:

Held, that the stipulation had the effect to give twenty days additional time to answer, and not fifteen days.

Held, further, that where the stipulation was signed on the sixth day of April, a demurrer served on the thirtieth was in time. (*Patterson et al.* agt. *O'Conner*, *ante*, 141.)

2. Under section 247 of the Code of Procedure, where "a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly." This practice is not changed, but remains the same under section 537 of the Code of Civil Procedure. (*Roblin* agt. *Long*, *ante*, 200.)

3. In an action brought in the courts of this state to enforce the judgment and decrees of the courts of a foreign state or country, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint will be stricken out as sham where the defendant appeared in the original action. (*Id.*)

4. Where in an action for damages alleged to arise from the breach of a written contract to do advertising, a joint liability is charged against numerous defendants, among whom are C., A. and C., copartners, and the latter defendants answer jointly, admitting that they had dealings with and did advertising for plaintiff, but aver that all such dealings were several as to them and not joint with the other defendants, and thereupon such copartners set up counter-claims in their answer, to which counter-claims plaintiff demurs on the ground that all the defendants in this action are sued on a joint liability, that the said counter-claims are alleged in favor of said

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defendants separately, and that as between the said defendants and the plaintiff a separate judgment in this action cannot be had:

Held, that a demurrer to such an answer is ill, and that defendants are entitled to judgment for the amount due under their counter-claims.

Held, also, that plaintiff's position would have been well taken under the former common-law rule; but that the Code of Procedure has radically changed the former rule, and that now under the new Code, section 1204, judgment may be given for or against one or more defendants; that the ultimate rights of parties on the same side, as between themselves, may be determined, and a defendant granted any affirmative relief to which he is entitled. (*Olegg* agt. *American Newspaper Union*, ante, 498.)

5. The plaintiff having demurred to an answer interposed by the defendant, the latter, within the time allowed by law, amended it. The plaintiff then procured an order striking out, as sham, false and frivolous, the second defense set up in the amended answer, and demurred to the first, third and fourth defenses contained therein. Afterwards the defendant, without procuring leave from the court so to do, served a third answer, setting up in due form his discharge in bankruptcy, this being the same defense insufficiently pleaded in the third defense of the amended answer. The third answer was returned by the plaintiff, on the ground that it could not be served without the leave of the court.

Thereafter the demurrer was sustained, the defendant being allowed to amend the said first, third and fourth defenses, within twenty days, on payment of the costs. Within that time, the defendant paid the costs, and served an answer, setting up simply his discharge in bankruptcy, such

answer being the same one already served and returned by the plaintiff. The plaintiff returned this answer as unauthorized by the order sustaining the demurrer, and because it had already been served and returned; and thereafter entered a judgment in his favor, by default, as for want of an answer.

On motion by the defendant to vacate the judgment and compel the plaintiff to accept the answer last served, *held*, that such answer was properly served, and that the plaintiff had no right to return it.

That the entering of the judgment by the plaintiff, after the service of the said answer, was not a mere irregularity, within the meaning of that term, as used in rule 37, requiring the irregularity complained of to be specified in the notice of motion. (*Decker* agt. *Kitchen*, 21 *Hun*, 332.)

6. Since the adoption of the Code of Civil Procedure the plaintiff can no longer treat an answer as a nullity and enter judgment as upon a default; his only remedy in such a case is to apply to the court or a judge thereof, upon notice, as prescribed in section 537 of the said Code. (*Id.*)

7. No reply need be served to an answer setting up a discharge in bankruptcy, to enable the plaintiff to avoid its effect by showing that the debt was fraudulently contracted. (*See Argall* agt. *Jacobs*, 21 *Hun*, 114.)

8. Fact that the particular defense sought to be established was not set forth in the answer, will not authorize the exclusion of evidence to sustain it, unless it was rejected on that ground. (*Brown* agt. *Decker*, 21 *Hun*, 199.)

9. When a defendant may deny allegations of the complaint upon information and belief. (*See Brotherton* agt. *Downey*, 21 *Hun*, 436.)

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10. What does not amount to an answer of a question in an application for insurance. (*See Dacey agt. Agricultural Ins. Co., 21 Hun, 83.*)

APPEAL.

1. The defendant's right to serve his demurrer within the twenty days' extended time, is clear and a substantial one, and the order denying its exercise is appealable. (*Pattison et al. agt. O'Connor, ante, 141.*)
2. Where a judgment is reversed "with costs to abide the event," and the order is silent as to which party is to receive the costs, it means that they are to go to the one ultimately successful. (*First National Bank agt. Fourth National Bank, ante, 436.*)
3. Where an application is made to vacate an attachment founded only upon the papers upon which the warrant was granted, an order denying such application is appealable to the general term. (*Achelis agt. Kalman, ante, 491.*)
4. On such appeal the general term must exercise the same supervision over the motion that the judge to whom it was originally made could have done. The general term must consider as to whether there is sufficient in the papers to justify the issuing of the attachment, not whether there was jurisdiction. (*Id.*)
5. Upon the trial of an action brought in the marine court of the city of New York by one Talcott, against one Salke, Talcott recovered a judgment, which was, upon appeal to the general term of the marine court, reversed, and a new trial ordered. Talcott then appealed to the general term of the court of common pleas, without giving the stipulation required by chapter 545 of 1874, to the

effect that judgment absolute might be rendered against him in the event of the affirmance of the order directing a new trial. The common pleas affirmed the order of the general term of the marine court, directing a new trial. Salke thereupon, claiming that the common pleas should have ordered a judgment absolute in his favor, procured a writ of prohibition, restraining Talcott and the marine court from taking any further proceedings in the action.

Upon an appeal from the order granting the said writ, *held*, that in the absence of the stipulation required by the act of 1874, the court of common pleas could not have ordered a judgment absolute in favor of Salke. (*People ex rel. Salke agt. Talcott, 21 Hun, 591.*)

6. That if the appeal could be taken without any stipulation having been given, the common pleas, in considering the case, were, by subdivision 2 of section 43 of chapter 479 of 1875, vested with a discretion as to the disposition to be made of it, which discretion was not reviewable at a special term of the supreme court on an application for a writ of prohibition. (*Id.*)
7. That if the relator was aggrieved by any irregularity in the form of the judgment of the court of common pleas, he should apply to that court for the correction of the judgment. (*Id.*)
8. That if the marine court had no authority to proceed further with the case, the relator could protect himself by raising the proper objections and by taking the proper exceptions when the case should be moved for trial, and by correcting any erroneous rulings thereon by appeal. (*Id.*)
9. Under section 1342 of the Code of Civil Procedure, no appeal can be taken to the supreme court from an order affecting a substan-

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- tial right, made by a court or judge, unless it was made in an action brought in a court of record. (*Fish agt. Thrasher*, 21 Hun, 15.)
10. No appeal lies from an order of the county court denying a motion for a new trial, where the action was brought in a court not of record, and subsequently came into the county court on appeal from a judgment of the court below. (*Id.*)
11. An appeal will not lie to the general term of the supreme court from an order of the county court made in an action commenced in a justice's court, and brought into the county court by appeal. (*Roberts agt. Marston*, 21 Hun, 363.)
12. When the general term, on appeal from a judgment, is bound by the decision of the same general term on an appeal from an order in the same action. (*See Rogers agt. Rochester, &c., R. R. Co.*, 21 Hun, 44.)
13. When a respondent cannot produce before an appellate court documentary evidence to sustain the judgment. (*See Moser agt. Mayor*, 21 Hun, 163.)
14. Under section 1023 of the Code of Civil Procedure, and the other sections thereof touching the subject, a judge or referee cannot be required or permitted to make additional findings of fact or of law upon the settlement of the case, after his report or decision has been rendered. (*Palmer agt. Phoenix Ins. Co.*, 22 Hun, 224.)
15. So far as Rule 32 conflicts with these sections it is inoperative. (*Id.*)
16. No appeal lies to the general term from an order of the county court denying a motion for a new trial, made in an action originally commenced in a justice's court.
- The appeal should be taken from the judgment entered in the county court. (*Perry agt. Round Lake Camp Meeting Ass.*, 22 Hun, 293.)
17. Discretion of surrogate in opening a decree, reviewable on appeal. (*See Story agt. Dayton*, 22 Hun, 450.)
18. A surviving surety to a joint undertaking on appeal, is liable to the successful party, in case the other surety dies insolvent. (*See Comins agt. Pottle*, 22 Hun, 287.)
19. Undertaking on — power of the court to amend it, on a motion by one of the sureties. (*See Sullivan agt. Connors*, 22 Hun, 137.)
20. Power of the supreme court to direct money to be paid to an executor, to defray the expenses of an appeal from a decree admitting a will to probate. (*See Swenarton and another agt. Hancock and another*, 22 Hun, 43.)
21. Upon dismissal of — costs must be taxed by the clerk — cannot be taxed by a judge under section 311 of the Code. (*See Andrews agt. Long*, 22 Hun, 24.)
22. When the court will not restrain the enforcement of a judgment abating a nuisance, pending an appeal. (*See Emmons agt. Campbell*, 22 Hun, 582.)
23. To court of appeals — when sureties on undertaking on are liable for all the costs of the action. (*See Burdett agt. Lowe*, 22 Hun, 588.)
24. Where an order of general term, reversing an order of special term, as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, in this respect it is a final decision, and an appeal in this court can be

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- taken. (*Bergen* agt. *Carmen*, 79 N. Y., 146.)
25. *It seems*, that in the absence of such a provision as to costs the order is not appealable. (*Id.*)
26. Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it. (*Cowing* agt. *Altman*, 79 N. Y., 167.)
27. So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. (*Id.*)
28. After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon the subject, and its decision is not reviewable here. (*Id.*)
29. The decision of a judge in settling interrogatories to be attached to a commission is an order (*Code*, sec. 767); if it disallows a pertinent question, it affects a substantial right, and is therefore appealable (*Code*, secs. 1347, 1348). (*Utine* agt. *N. Y. C. and H. R. R. Co.*, 79 N. Y., 175.)
30. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial (*Code*, sec. 911). (*Id.*)
31. The provision of the act of 1874, in reference to the marine court of the city of New York (sec. 9, chap. 545, *Laws of 1874*), which requires that a notice of appeal, from an order of the general term of said marine court to the court of common pleas, reversing a judgment and granting a new trial, shall "contain an assent, on the part of the appellant, that if the order be affirmed, judgment absolute shall be entered against him," &c., was not repealed or abrogated by the provision of the act of 1875 (chap. 479, *Laws of 1875*), in reference to said marine court, which regulates appeals from the general term thereof. (*Gordon* agt. *Hartman*, 79 N. Y., 221.)
32. Where the common pleas affirms the order appealed from, and gives judgment absolute on the stipulation against the appellant, the judgment is final; and no appeal therefrom lies to this court. (*Id.*)
33. In a case tried by the court, a finding of fact, without evidence to support it, if excepted to, presents a question of law subject to review in this court. (*Sickles* agt. *Flannagan*, 79 N. Y., 224.)
34. Defendant issued to O., its general agent, an open or underwriter's policy of insurance, which contained a condition, that if the interest of the insured be other than the entire and sole ownership, it must be so represented to the company, and so expressed in the written part of the policy, otherwise it would be void. O. issued to B. & Co. two certificates of insurance, which were indorsed upon the policy, upon wheat in their elevator; in one loss, if any, payable to whom it may concern; in the other, loss payable to R. Previous to obtaining the insurance R. had discounted drafts, drawn by B. & Co. upon him, receiving as security warehouse receipts of specified quantities of wheat in said elevator. After a loss B. & Co. assigned the certificates to R. In an action thereon defendant set up as a defense a breach of said condition. The case on appeal

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did not contain the evidence, but simply stated that certain facts were proved. There was no suggestion therein as to whether or not any representations were made by B. & Co., as to the nature of their interest, no request to find, and no findings upon that subject; the only exceptions were to the findings as made. The court by whom the cause was tried found that all the conditions of the policy had been duly kept and performed. The general term reversed the judgment on the ground that there was a breach of this condition:

Held, error; that it did not appear from the bill of exceptions that this question was litigated upon the trial, and there was no exception enabling the court to consider it on appeal; that the burden of proving a breach of the condition was upon defendant; that if B. & Co., when the insurance was procured, informed O. of the nature of their interest, and he omitted to describe it in the policy, defendant would be deemed to have waived the condition, and it could not be assumed that this was not done. (*Richmond* agt. *Nia. F. Ins. Co.*, 79 N. Y., 230.)

35. A receiver of a life insurance company obtained an order as prescribed by statute (2 R. S., 467, sec. 56), for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; misled by such circulars the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the referee to whom it was referred to take proof as to the distribution of the assets. Whereupon, and before

any dividend had been made, the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee:

Held, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here. (*In re Peo. ex rel. agt. Secur. L. Ins. and An. Co.*, 79 N. Y., 267.)

36. An order punishing for contempt, in violating an injunction, can only be reviewed upon the merits or for alleged legal error, on appeal from the order. (*Watrous* agt. *Kearney*, 79 N. Y., 496.)

37. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. (*Id.*)

38. This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time. (*Standard Oil Co. agt. Amazon Ins. Co.*, 79 N. Y., 506.)

39. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. (*Id.*)

40. This rule has not been changed by the provision of the Code of Civil Procedure (sec. 399) in reference to the granting of a new trial by the judge presiding at the trial. (*Id.*)

41. For such errors, *it seems*, the general term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. (*Id.*)

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42. The provision of the Code of Civil Procedure (*sec.* 1342), in reference to appeals to the supreme court from orders of a county court, confines the appellate jurisdiction to orders in actions originating in the county court. (*Andrews* *agt.* *Long*, 79 *N. Y.*, 573.)
43. Accordingly, *held*, that an order of county court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the supreme court. (*Id.*)
44. Where, upon the facts presented, the allowance of a supplemental pleading is in the discretion of the supreme court, the exercise of this discretion by the special term may be reviewed by the general term, but not by this court. (*Fleischmann* *agt.* *Bennett*, 79 *N. Y.*, 579.)
45. Where an order of special term, vacating an assessment for a local improvement, is reversed by the general term on the ground that the assessment should be reduced, not vacated, and the case is remitted to the special term, that the assessment may be modified in conformity with the principles laid down by the general term, the order of the general term is not a final order; and so is not reviewable here. (*In re Pet. Auchmuty*, 79 *N. Y.*, 622.)
46. To sustain an exception to the refusal of a referee to find facts as requested, it is incumbent upon the party to show that the material facts so requested to be found were established by uncontroverted evidence, and that if found they would have affected the result. (*Stewart* *agt.* *Morss*, 79 *N. Y.*, 629.)
47. No question can be raised in this court upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. (*Id.*)
48. This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon. (*People ex rel. agt. Village of N.*, 79 *N. Y.*, 638.)
49. Accordingly, *held*, that the court had jurisdiction to make an *ex parte* order, correcting a remittitur, which had been filed with the clerk of the court below, but upon which no action had been taken in that court. (*Id.*)
50. Costs of appeal in proceedings by common law *certiorari* are not allowable, whether the proceedings come here upon appeal from a judgment or from an order superseding the writ. (*Id.*)
51. Order of supreme court refusing to quash a writ of *certiorari* removing an indictment into that court from theoyer and terminator, not reviewable here. (*See Jones* *agt.* *People*, 79 *N. Y.*, 45.)
52. Sufficiency of exception to present questions on. (*See F. N. Bank* *agt.* *Dana*, 79 *N. Y.*, 108.)
53. When action was in form against defendant as executor, when it should have been against him individually, but objection was not taken below, and the result is the same:
Held, that the action would be treated as if the defendant was sued individually. (*See Brown* *agt.* *Knapp*, 79 *N. Y.*, 136.)
54. Question not raised below cannot be presented upon appeal. (*See Kirkpatrick* *agt.* *N. Y. C. and H. R. R. R. Co.*, 79 *N. Y.*, 240.)
55. When question not raised below cannot be raised on appeal; also, to reverse conclusions of law by referee it must appear from the facts found that they are erroneous. (*See Collender* *agt.* *Phelan*, 79 *N. Y.*, 366.)

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56. Where a motion for judgment on return to a writ of *certiorari* in proceedings before the mayor of New York city to remove a police commissioner is allowed to be heard upon order to show cause on less than eight days' notice, the propriety of granting the order is reviewable. (*See People ex rel. agt. Nichols*, 79 N. Y., 582.)

57. To justify an appellate court in rendering final judgment against the respondent upon reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial; it must appear that he certainly cannot. (*Guernsey agt. Miller*, 80 N. Y., 181.)

58. A *certiorari* to correct an assessment-roll, by striking out an illegal assessment, was issued after the assessors had completed the roll and delivered it to the supervisor of the town. This fact appearing on the return to the writ, a supplemental writ was issued to the supervisor, commanding him to bring the roll into court, which was done, and a hearing was then had on both writs, on the merits. The objection that the writ was not the proper remedy because of the fact that the roll had passed out of the hands of the assessors was not raised:

Held, that the defendants were concluded from raising it here. (*People ex rel. agt. McLelan*, 80 N. Y., 254.)

59. After plaintiff had been partially examined as a witness, on trial before a referee the hearing was adjourned, and was set down for two successive days. The referee upon the first day informed the attorney for the parties that the case would not be proceeded with that day, but would be the next. He was advised by defendant's attorney that he could not attend the next day; he did not appear, and the case was proceeded with on the second day.

Several witnesses being examined for plaintiff without any one appearing for defendant. A motion was made on behalf of defendants at special term to strike out the evidence so given, which was denied. A similar motion was thereafter made before the referee upon a subsequent hearing, which was denied:

Held, that the claim of a mistrial because of the proceeding of the referee without an adjournment was a question of irregularity disposed of on the motion, and not reviewable on appeal from the judgment. (*Comins agt. Hetfield*, 80 N. Y., 261.)

60. Also, *held*, that an order of special term denying a motion to set aside the referee's report and the judgment thereon, and to vacate the order of reference because of irregularity in the proceedings before the referee, was not reviewable here; that it was a matter addressed to the discretion of that court. (*Id.*)

61. Under the provisions of the Code of Civil Procedure (§§ 191, 194), requiring a party, on appeal from an order granting a new trial, to stipulate for judgment against him in case of affirmance, and directing this court, in such case, to render judgment absolute upon the right of the appellants; also authorizing such proceedings in the court below upon the remittitur as are not necessary to render the judgment effectual, the judgment must be absolute against the appellant upon the whole matter and right in controversy in the action. (*Hiscock agt. Harris*, 80 N. Y., 402.)

62. Where, therefore, an order, reversing a judgment in favor of plaintiff and granting a new trial, is affirmed on appeal to this court, and judgment absolute ordered, in an action wherein the answer sets up a counter-claim, defendant is entitled to such judgment upon

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- the remittitur as the facts alleged by him in his answer entitle him to. (*Id.*)
63. *It seems*, that where, upon the trial of an action, either civil or criminal, the court corrects, or offers to correct, an erroneous ruling, and the party against whom it was made refuses to consent to the correction, or to avail himself of the offer, an exception to the ruling will not be available on appeal, provided the appellate court can see that the acceptance of the offer would have relieved the party from any actual or possible injury in consequence of the erroneous ruling. (*Cox* agt. *People*, 80 N. Y., 500.)
64. The caption of an order for the service of summons by publication was "At a special term of the supreme court, * * * held at chambers;" and there was a direction to enter it. It did not appear that it was entered as a court order; it was in fact made by the judge whose name appeared in the caption, out of court, in his private chambers; it was signed with his initials and those of his office; and in the body thereof it purported to be made by the judge. The general term held that the caption and the direction to enter were not conclusive, and that the order was good as a chamber order of the judge:
Held, that as the question was purely one of form, this court would not differ with the court below on so technical a point of practice. Order, therefore, affirmed. (*Phinney* agt. *Broschell*, 80 N. Y., 544.)
65. An appeal from an order of general term affirming a judgment is premature and unauthorized; judgment should first be entered and the appeal taken from the judgment. (*Kilmer* agt. *Bradley*, 80 N. Y., 630.)
66. The question as to whether this court has jurisdiction on appeal from a judgment, or from an order granting or refusing a new trial, is to be determined by the amount in controversy in the general term. (*Davidson* agt. *Alfaro*, 80 N. Y., 660.)
67. Objection not raised below, not available on appeal. (*See Park* agt. *Park*, 80 N. Y., 156.)
68. Where no exceptions are taken on trial, or to referee's refusal to find, and order modifying judgment by general term does not state it was upon facts, order cannot be sustained. (*See Brown* agt. *Gallaudet*, 80 N. Y., 414.)
69. Order amending order of publication, not reviewable here. (*See Mojarrieta* agt. *Saenz*, 80 N. Y., 553.)
70. Where evidence upon question of fact is conflicting, judgment cannot be reversed here on ground that verdict is against weight of evidence. (*See Green* agt. *Fortier* [Mem.], 80 N. Y., 640.)
71. Order vacating an attachment not reviewable here. (*See Clafin* agt. *Baere* [Mem.], 80 N. Y., 642.)
72. General term of the supreme court has no power to vacate judgment as to costs which has been affirmed by this court, at least when no new facts are presented. (*See Sheridan* agt. *Andrews* [Mem.], 80 N. Y., 648.)

APPEARANCE.

1. When a married woman may appear by her own attorney. (*See Janinski* agt. *Heidelberg*, 21 Hun, 439.)

ARREST.

1. The affidavit upon which the order of arrest was founded was

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made upon information and belief, without stating the source of such information; the application was made *ex parte*, and the moving affidavit did not state whether any previous application had been made. The order of arrest and the undertaking were not indorsed with the office address or place of business of plaintiff's attorney, nor was the order of arrest subscribed by plaintiff's attorney, and but one surety made affidavit of justification. On motion by defendant's attorney to vacate order of arrest, plaintiff's attorney asked leave to amend:

Held, that leave to amend should be denied and motion to vacate should be granted. (*Jones* agt. *Platt*, *ante*, 73.)

2. Though each partner is liable to arrest for the frauds committed by the other members of the firm, although he may have been entirely ignorant of such frauds; yet upon application by a member to be discharged from imprisonment under the provisions of the Revised Statutes, it being the duty of an opposing creditor to show that the proceeding upon the part of the prisoner is not just and fair, personal participation in the fraud by the applicant is required to be proved in order to justify the court, in denying such discharge. (*Matter of Benson*, *ante*, 314.)

3. A judgment, therefore, that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property, does not necessarily preclude his discharge as one of the partners. (*Id.*)

See DISCONTINUANCE OF ACTION.
Livermore agt. *Berdell*, *ante*, 308.

4. Where a defendant, in an action brought against him by his wife, for a limited divorce, fails to comply with the terms of an order, requiring him to pay a certain sum of money to her attorney to

meet the expenses of the suit, he is guilty of a contempt, for which the court may issue a precept committing him to jail. (*Strobridge* agt. *Strobridge*, 21 *Hun*, 288.)

5. Upon the return of an order, requiring the defendant to show cause why he should not be committed for failing to comply with the terms of such an order, he cannot show, in opposition to the motion, that his pecuniary circumstances are such as to render him unable to pay the moneys thereby required to be paid. (*Id.*)

6. An application under 2 Revised Statutes, 538, section 20, for relief, on the ground of the applicant's inability to comply with the requirements of the order, must be made to the court, upon notice to the adverse party. (*Id.*)

7. *Semble*, that the remedy afforded by the said section was intended for those only who are actually imprisoned. (*Id.*)

8. This action was brought to recover moneys alleged to have been fraudulently embezzled and misappropriated by the defendant while acting as a book-keeper for the plaintiff. Upon a motion to vacate an order of arrest granted herein, the court below found that a portion of the sum sought to be recovered had probably been fraudulently appropriated by the defendant, and that the residue had been obtained and used by him with the plaintiff's knowledge and consent, and held that, inasmuch as the demand upon which an order of arrest could have been properly granted had been united with one upon which it could not be granted, that the order should be vacated:

Held, that the order was properly vacated. (*Easton* agt. *Casidy*, 21 *Hun*, 549.)

9. To authorize the granting of an order of arrest, under subdivision

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- 4 of section 549 of the Code of Civil Procedure, as amended in 1879, the complaint must allege the cause of action therein set forth to be fraudulent or to have been fraudulently contracted, and must limit the application for the order to such cause of action. (*Id.*)
10. Arrest of a party under an execution, while returning from attendance at a court—remedy of, is by a motion and not by a writ of *habeas corpus*—a party must be in actual custody to authorize such writ to issue. (*See Matter of Lampert*, 21 *Hun*, 154.)
11. A police officer is not authorized, without process, to arrest a person as a common prostitute, on the ground that she is a disorderly person, unless the offense was committed in his presence. (*People ex rel. Kingsley* agt. *Pratt*, 22 *Hun*, 300.)
12. A city ordinance providing that "policemen shall have power * * * to arrest * * * all vagrants, common prostitutes, drunkards and other disorderly persons found in the city," must be construed as a power to arrest such offenders in the manner required by the general, common and statutory law of the state, and not as giving additional power to such officers, not warranted by and not in harmony with such general law. (*Id.*)
13. A complaint before a police magistrate to the effect that the complainant had heard and believed a person to be a common prostitute, without stating the source of his information, or the grounds of his belief, will not justify the magistrate in proceeding with the trial of the person upon such charge. (*Id.*)
14. Section 568 of the Code of Civil Procedure, authorizing a motion to vacate an order of arrest, founded upon proof by affidavit on the part of the defendant, to be made "to the court, or, if the order was granted by a judge out of court, to any judge of the court upon notice," is not in conflict with, nor does it abrogate the provisions of section 769 of the said Code, which requires all motions, upon notice, in an action in the supreme court, to be made within the judicial district in which the action is triable, or in a county adjoining it, except that when it is triable in the first judicial district, the motion must be made therein. (*Sutton* agt. *Sabey*, 22 *Hun*, 557.)
15. When the facts on which an order of arrest is granted are not extrinsic to the cause of action, but the nature of the action alone furnishes the authority for granting it, it should not be vacated upon evidence tending to disprove the existence of the cause of action; the merits of the controversy should not be determined upon affidavits, but should be allowed to await the trial of the action. (*Peck* agt. *Lombard*, 22 *Hun*, 63.)
16. Under section 552 of the Code of Civil Procedure, a defendant may be arrested in an action brought in this state upon a judgment recovered in a circuit court of the United States, provided he might have been so arrested had the original action been brought here. (*Baxter* agt. *Drake*, 22 *Hun*, 565.)
17. *Supersedeas*—when a defendant is not in actual custody so as to authorize an application for it. (*See Watt* agt. *Healy*, 22 *Hun*, 491.)
18. When conditions will not be imposed, where an execution against the person is set aside. (*See Catlin* agt. *Adirondack Co.*, 22 *Hun*, 493.)
19. Motion by a defendant to be discharged from, because of the failure of the plaintiff to enter judgment—where it may be made

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— not necessary to show that the plaintiff knew he was in actual custody — Code Civil Procedure, section 572. (*See Sumner agt. Osborn, 22 Hun, 13.*)

20. An order of arrest was issued in an action to recover damages for wrongfully and maliciously cutting down and carrying away certain telegraph poles, with the wires and insulators attached thereto, which were located in a highway in the state of New Jersey, and formed part of a continuous telegraph line in operation in that state. On motion to vacate the order of arrest, *held*, that the order was not properly granted; that as the poles were affixed to the soil they were part of the realty, and the cutting down of the same was a trespass, the damages for which could only be recovered in an action *quære clausum fregit*; that the cutting down and removal charged was one continuous transaction, constituting but one cause of action, which could not be divided, and was local; also, that the objection as to jurisdiction could be taken on such a motion; as, if the order of arrest was granted without authority, defendant was entitled to have it vacated, and was not bound to raise the question by answer or demurrer. (*Am. Un. Tel. Co. agt. Middleton, 80 N. Y., 408.*)

21. It appeared, by the affidavits, that defendant cut the poles in a highway, and carried them to the ditches and side fences of the road, and left them:

Held, that conceding the poles and wires could have been made the subject of a conversion after they had been severed, no such conversion actually took place; also, that as the order of arrest was granted for the cutting, as well as the conversion, even if such conversion took place, the order should be vacated, for the reason that the right of arrest is not applicable to all the causes of action. (*Id.*)

22. When undertaking in form unauthorized by the statute taken by sheriff from defendant, arrest under order of arrest in action to recover possession of personal property is void. (*See Cook agt. Freudenthal, 80 N. Y., 202.*)

ATTACHMENT.

1. The defendants had in store for plaintiff a quantity of coffee, to be held for it, with liberty to sell, and to pay the plaintiff, out of the proceeds, the amount due upon bills of exchange which it had discounted on the security of the property. The defendants sold the coffee, using the proceeds, which were more than sufficient to pay the drafts, in their business:

Held, upon a motion to vacate an attachment granted upon these facts, that the modified wording of section 636 of the Code of Civil Procedure has not changed the provision of section 227 of the former Code in this respect, and that the attachment cannot be sustained, because it has not been shown that the debtors either assigned, disposed of, or secreted, or were about to assign, dispose of, or secrete their property, with the intent to defraud their creditors.

Held, that the provision as to attachments differs in this respect from that providing for the making of an order of arrest; so that a debtor is liable to arrest, but not to seizure of his property by attachment, when he may have disposed of plaintiff's property or that of any other person with intent to defraud its owner. (*German Bank of London agt. Dash, ante, 124.*)

2. A bill in equity to dissolve a partnership and to adjudge void certain attachments issued by creditors of the firm, is demurrable by said creditors. As to such creditors the remedy at law against their enforcing said attachments is adequate. The parties can re-

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- lease the attached property by a bond. They can move to vacate the attachments. They can defend on the ground that the court issuing the attachments has no jurisdiction. If such creditors sue in the wrong court, it is not the province of a court of equity to bring them in as parties to answer an allegation to that effect and to have their suit arrested. (*Fielding* agt. *Lucas et al.*, ante, 184.)
3. It matters not what a person believes or disbelieves, the applicant for an attachment under subdivision 2 of section 636 of the Code of Civil Procedure, must show by proof of facts known to the witnesses who testify to them, that the belief in the intent to defraud by a disposition of the property is well founded. In other words the intent so to defraud must be a fair and logical sequence from facts proved. (*Ellison* agt. *Bernstein*, ante, 145.)
4. It is not enough that a witness is willing to testify to a fact positively; he will not be allowed to so testify, when it is plain that he can have no actual knowledge on the subject. The sources of information must be given, so that the tribunal called upon to act can see that the facts sought to be proved are established by legitimate testimony. (*Id.*)
5. The facts (even if true), that the defendant was insolvent when he made the purchases, that he bought more goods than he needed, and that he failed to disclose his insolvency in the absence of any false statements, are not sufficient to show any intent to defraud. (*Id.*)
6. Nor is it any evidence of intent to defraud, that the defendant refused to secure the plaintiffs; so long as the law allows preferences to creditors by a failing debtor, it cannot be proof of intent to defraud, that the defendant in-
- tends to do what the law permits. (*Id.*)
7. A purchaser, from a defendant in an action, of certain property against which an attachment has been issued, may, under section 682 of the Code of Civil Procedure, move to vacate the attachment. (*Trow's Printing and Book-binding Company* agt. *Hart*, ante, 190.)
8. The attachment was properly vacated, on the ground that the affidavit did not show that the plaintiff was entitled to recover a sum stated therein over and above all counter-claims known to him (*Code of Civil Procedure*, sec. 636). (*Id.*)
9. Where the motion to vacate the attachment is made upon the papers on which the warrant is granted, the plaintiff cannot put in additional affidavits in support of the attachment. (*Id.*)
10. Where an application is made to vacate an attachment founded only upon the papers upon which the warrant was granted, an order denying such application is appealable to the general term. (*Achelis et al.* agt. *Kalman*, ante, 491.)
11. On such appeal the general term must exercise the same supervision over the motion that the judge to whom it was originally made could have done. The general term must consider as to whether there is sufficient in the papers to justify the issuing of the attachment, not whether there was jurisdiction. (*Id.*)
12. Where the facts set forth in the affidavits, upon which the attachment was granted, were that the defendant purchased the goods in question August 6, 1880, on a credit of thirty days from September 15, 1880; that the goods was obtained by false and fraudu-

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lent representations; stating the negotiations which entered into the sale, the representations alleged to have been made, and that such statements were false; shows in what respect it is claimed they were false, and points out the indebtedness existing at the time; then makes a general allegation that "the defendant has assigned and disposed of his property with intent to defraud his creditors; that after purchasing said goods, the defendant shipped about one-half of them to auction houses in other cities, and sold the same at auction. After this allegation follows a general charge that the defendant, on October 12, 1880, made a general assignment with preferences:

Held, that there was sufficient in the papers to justify an order of arrest, admitting the facts in the affidavits to be true, but there was not sufficient to justify the attachment. (*Id.*)

13. Where the party made an assignment in October, the goods being bought in August, and there being preferences to creditors whom he owed, the court cannot assume from that fact that there was a fraudulent disposition of his property:

Held, further, that the attachment must be reversed, for the reason that there was no connection between the previous acts and the assignment to prove the assignment to have been made with a fraudulent intent, or to warrant that conclusion. (*Id.*)

14. Where, in an action brought against a firm, consisting of two members, an attachment is issued, and thereafter one of the partners is personally served with the summons, but the other is not, nor are proceedings to serve him therewith by publication commenced within the thirty days required by the statute, the attachment ceases to be a lien upon

the firm property. (*Donnell agt. Williams, 21 Hun, 216.*)

15. The failure to state, in an affidavit upon which an application for an attachment is made, that the plaintiff is entitled to recover the sum specified therein, over and above all counter-claims known to him, as required by section 636 of the Code of Civil Procedure, renders the attachment void *ab initio*. (*Id.*)

16. The complaint in this action alleged that the plaintiff and the defendant Walter were co-partners, and that the firm had become insolvent; that the other defendants had, by collusion with the defendant Walter, commenced actions against the firm in the marine court of the city of New York, in which attachments had been issued, under which property of the firm had been seized; that such attachments were void, for the reason that the firm had a place of business in the city of New York, though both of the members thereof resided in Kings county. The relief sought was the dissolution of the firm, the appointing of a receiver, the vacating of the attachment, and also that the said defendants might be restrained from further prosecuting their actions in the marine court:

Held, that as to the attaching creditor, the complaint did not state facts sufficient to constitute a cause of action, and that it should be dismissed. (*Fielding agt. Lucas, 22 Hun, 22.*)

17. An attachment which has become invalid by reason of the failure of the plaintiff to serve the summons, either personally or by publication, within thirty days from the time it was issued, is not revived and rendered valid by the subsequent appearance of the defendant in the action. (*Blossom agt. Estes, 22 Hun, 472.*)

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18. Upon the return of an attachment against defendant for an alleged contempt in disobeying the provision contained in a judgment of divorce herein, which required him to pay alimony and to give security for the payment thereof; and upon motion to vacate the attachment the court adjudged him to be in contempt, and ordered him to pay a fine, to give security in a specified amount for future alimony, and to stand committed until compliance with the order:

Held, that the whole matter was before the court and it had jurisdiction to grant such relief. (*Park* agt. *Park*, 80 N. Y., 156.)

19. The attachment was issued upon proof of service of copy of the judgment, with demand of payment of the alimony in arrear, with the costs, and the giving security as required by the judgment, and proof of defendant's failure to comply therewith:

Held, that the papers served were sufficient to authorize the issuing of the writ (*Code of Civil Procedure*, sec. 14); that the judgment contained all that was necessary to advise defendant of the nature of the claim made against him. (*Id.*)

20. Defendant claimed that the attachment should have been vacated, because based on his refusal to pay costs:

Held, untenable as it was issued for "disobedience to the lawful mandate of a court" (*Code of Civil Procedure*, sec. 14, sub. 3); and that the provision of the statute of 1847 (sec. 2, chap. 390, *Laws of 1847*), prohibiting imprisonment for contempt in not paying costs, had no application. (*Id.*)

21. The action was commenced by the service of a summons; defendant did not appear; it was objected that the court had no jurisdiction to decree alimony, because

no complaint demanding it was served:

Held, untenable; that if the judgment was erroneous in this respect it should have been corrected on motion to vacate or modify. (*Id.*)

22. Also, *held*, that plaintiff was not estopped from enforcing, in this manner, payment of alimony, by the fact that the judgment authorized an execution to be issued. (*Id.*)

23. It was objected that no competent order was made for the issuing of the attachment; this objection was not raised at special term. Upon the attachment was an indorsement signed by the clerk of the court stating that it was issued by special order of the court:

Held, that the presumption was that such an order had been made; but in any event, as the objection was not raised below, it was not available here. (*Id.*)

ATTORNEY.

1. A receiver in supplementary proceedings may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted (*Overruling Branch* agt. *Branch*, 49 *How.*, 196; and *Cumming*, *Receiver*, agt. *Edgerton*, 9 *Bosw.*, 685). (*Baker* agt. *Van Epps*, ante, 79.)

2. The attorney has a lien upon the papers in the suit, which cannot be divested without payment, but he has no lien upon the client, and cannot prevent him from employing another attorney to represent him. (*Prentiss* agt. *Livingston et al.*, ante, 380.)

3. Where motion was made by defendants for substitution of a new attorney:

Held, that the motion should be granted; but if the defendants

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- desire the papers in the possession of their attorney they must first discharge his lien. If this relief is not insisted upon the order for substitution must provide that the taxable costs in the action to the present time (if collected upon a favorable termination of the action) be paid to the present attorney of the defendants, to whom they equitably belong. (*Id.*)
4. The amendment to section 68 of the Code of Civil Procedure, passed in 1879, gives to the attorney of record, from the commencement of an action or the service of an answer containing a counter-claim, a lien upon his client's cause of action or counter-claim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after the judgment. (*McCabe* agt. *Fogg*, ante, 488.)
 5. But no new remedy is provided for the enforcement of the lien, and, in order to make it available in the case of a settlement before judgment, the attorney, while he need no longer prove fraud or collusion, must still go on with the litigation until judgment, which is to be perfected for cost only. (*Id.*)
 6. *Semble*, that under section 66 of the Code of Civil Procedure, as amended in 1879, the attorney for a defendant, in whose favor a judgment for costs has been entered upon the dismissal of the complaint, acquires a lien thereon for his compensation, which is superior to the right of the plaintiff to set off a prior judgment in his favor, whether he seek to enforce such right upon a motion or by an action. (*Ennis* agt. *Curry*, 22 *Hun*, 584.)
 7. Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings. (*Watrous* agt. *Kearney*, 79 *N. Y.*, 496.)
 8. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney who appeared on return of the attachment made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred, to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report:
Held, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order. (*Id.*)
 9. As to how far the right of lien of an attorney for costs will stand in the way of a set-off of a judgment, sought in an equitable action, *quære*. (*Davidson* agt. *Alfaro*, 80 *N. Y.*, 660.)

ATTORNEY AND CLIENT.

1. One Foster, the owner of a lot upon which was a mortgage for \$1,000, owned by one Root, and one for \$500, owned by one Crosby, entered into negotiations with the defendant Wright, for the sale of the lot to him, subject to the Root mortgage, upon the agreement that he should pay the Crosby mortgage. While the negotiations were pending, Foster, Crosby and Root each called upon one Howe, an attorney, and requested him to draw such papers

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as might be necessary to carry out the agreement between them, which he did. Thereafter Foster conveyed the lot to Wright by a deed, containing a clause by which the latter assumed the payment of the Root mortgage. Wright also agreed to and did thereafter pay and discharge the Crosby mortgage.

In an action to foreclose the Root mortgage, and hold Wright liable for any deficiency that might arise on a sale, he claimed that the deed, though absolute on its face, was intended as a mortgage, and that he was not liable, upon the covenant, for the assumption of the Root mortgage contained therein:

Held, that the relation of attorney and client did not exist between Wright and Howe, so as to render the testimony of the latter as to the declarations and acts of the parties relating to the agreements entered into between them inadmissible, under section 835 of the Code of Civil Procedure. (*Root agt. Wright*, 21 Hun, 344.)

2. The plaintiff, a married woman, having brought this action, under the civil damage act, to recover the damages resulting from the intoxication of her husband, alleged to have been caused by liquor sold to him by the defendant, the same was, after issue joined and before trial, settled by the parties, the defendant paying to the plaintiff thirty dollars, and each party agreeing to pay their own costs. The plaintiff executed to the defendant a release of the cause of action, under seal, and a stipulation, upon which an order discontinuing the action was entered. Thereafter, upon an application made in the name and behalf of the plaintiff, an order was made setting aside and vacating the settlement and discontinuance, upon the ground that it was made in fraud of the rights of the plaintiff's attorneys:

Held, that the settlement hav-

ing been made in good faith between the parties, it was, as against the plaintiff, a bar to the further prosecution of the action by her, or to her suing again for the same cause of action. (*Murray agt. Gibson*, 22 Hun, 386.)

3. That so far as the rights of the plaintiff's attorneys were concerned, they must be enforced in proceedings to be instituted by them and in their own name. (*Id.*)
4. Code of Civil Procedure, section 66, as amended in 1879 — when an attorney must have given notice of the assignment of a part of the recovery to him in order to justify his moving to set aside a settlement entered into between the parties. (*See Jenkins agt. Adams*, 22 Hun, 600.)
5. Action by an attorney for professional services — when it involves the examination of a long account — when it may be referred to an attorney to hear and determine. (*See Carr agt. Berdell*, 22 Hun, 130.)
6. Every communication which a client makes to his legal adviser for the purpose of professional aid or advice is protected. (*Bacon agt. Frisbie*, 80 N. Y., 394.)
7. Although an attorney, when called as a witness as to communications made to him, disclaims that he was acting in a professional capacity, that is a matter for the court to determine from the facts appearing. (*Id.*)
8. It is not essential to bring the case within the statutory prohibition that a fee was paid at the time of the communication, or that a suit was pending or contemplated; if the communication was in the course of any professional employment, related to the subject-matter thereof, and may be supposed to have been drawn out in consequence of the relation

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of the parties to each other, it is entitled to protection as a privileged communication. (*Id.*)

9. The rule of exclusion applies to every attempt to give the communication in evidence without the assent of the person making it; and so, includes a case where the evidence is sought to be given without such consent against a third person. (*Id.*)

10. *It seems*, that when such a communication is sought to be proved in an action, to which the person making it is not a party, an objection thereto, by the party against whom it is offered, will lie, on the ground of public policy. (*Id.*)

ATTORNEY-GENERAL.

See PRACTICE.

The People agt. *Bruff*, ante, 1.

ATTORNEY'S LIEN.

1. The attorney has a lien upon the papers in the suit, which cannot be divested without payment, but he has no lien upon the client, and cannot prevent him from employing another attorney to represent him. (*Prentiss* agt. *Livingston et al.*, ante, 380.)

2. Where motion was made by defendants for substitution of a new attorney:

Held, that the motion should be granted; but if the defendants desire the papers in the possession of their attorney they must first discharge his lien. If this relief is not insisted upon the order for substitution must provide that the taxable costs in the action to the present time (if collected upon a favorable termination of the action) be paid to the present attorney of the defendants, to whom they equitably belong. (*Id.*)

3. While the defendants were, as attorneys for one Levi, prosecut-

ing an action brought by him upon a promissory note, Levi assigned his interest therein to the plaintiff's testator. The only consideration for the assignment, which was drawn by one of the defendants, was a pre-existing debt due from Levi to the assignee:

Held, that the defendants had a lien upon the proceeds of the judgment recovered in the action, not only for their services rendered therein, but also for their general account for professional services rendered to the assignor, and that the rights of the assignee were subject thereto. (*Schwartz* agt. *Schwartz*, 21 *Hun*, 33.)

BENEVOLENT SOCIETY.

1. An association whose members become entitled to privileges or rights of property therein, cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity of being heard. The service of notice, in the absence of any agreement to the contrary or any provision in the charter or by-laws controlling the same, must be made personally. (*Wachtel* agt. *The Noah Widows and Orphans' Benevolent Society*, ante, 424.)

BILL OF PARTICULARS.

1. In an action of slander the complaint alleged that on or about the 4th, 5th or 6th days of August, 1880, &c., the defendant, at the town of Western and elsewhere, &c., and at divers and various other times and places, and in the presence and hearing of divers good and worthy citizens, spoke of and concerning this plaintiff, &c. Upon application of the defendant an order was made directing plaintiff to deliver to defendant a bill of particulars specifying the times when and the places where the slanderous words al-

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leged were spoken. A bill was served, which, after specifying a few times and places, stated that said defendant "did, as plaintiff is informed and believes, at other places and dates and times, in the town of Western, in said county of Oneida, during the month of August, 1880, speak of and concerning said plaintiff, the slanderous and defamatory words in the complaint mentioned and set out, but at what particular place or places or dates, said plaintiff is now absolutely unable to state or set out more particularly and definitely." Upon application of defendant for a further bill, which should comply literally with the order of the court, and also give the names of the persons in whose presence the words were spoken:

Held, that the plaintiff should be compelled to strike out the above clause or state the particular times and places, but was not compelled to give the names of the persons in whose presence the words were spoken. (*Jones* agt. *Platt*, ante, 277.)

2. The decision in *Stiebling* agt. *Lockhaus* (21 *Hun*, 457) not followed. (*Id.*)

3. A broker who is the agent of his client is, and ought to be, required to show fully and specifically each item of the account which he charges against his client. (*Miller et al.* agt. *Kent*, ante, 88.)

4. Each of the parties to such an account is entitled to know and to have presented to him, when a demand is made for a loss supposed or real, the items which make up such loss, and to be given an opportunity not only to inspect and ascertain the correctness of the same, but to controvert such items whenever it becomes necessary. (*Id.*)

5. This action was brought by the plaintiff to recover the damages occasioned by an alleged slander.

The complaint charged that the defendant "did, sometime during the month of September, 1879, at the city of New York, falsely, wrongfully and maliciously speak, utter and publish the following false, defamatory and actionable words of and concerning the plaintiff, in the German language, in the presence and hearing of divers persons, all of whom understood the same;" it then set forth the language in German and English, and alleged that by reason of the speaking of such words the plaintiff "was greatly injured in his fame, reputation and good name as a physician, and in his earnings, profits and income as such," and that he had sustained great damages.

Upon an application by the defendant for a bill of particulars, *held*, that the plaintiff should be required to furnish a bill of particulars, specifying at what place or places, and in the presence of what person or persons, the words were claimed to have been spoken. (*Stiebling* agt. *Lockhaus*, 21 *Hun*, 457.)

6. That as the allegations as to the injury to the earnings, profits and income of the plaintiff as a physician were not sufficient to allow him to prove special damages in particular instances, upon the trial, it was unnecessary to order a bill of particulars in those respects. (*Id.*)

7. In this action, brought by the plaintiffs upon a policy of insurance issued upon the life of their testator, the defense was that certain of the answers made by him to the questions contained in the application upon which the policy was issued were false and untrue, and that the policy was thereby avoided. The answer alleged that the testator had stated in his application that he had made no other application for insurance which had been refused, and alleged that this was false, and

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that he had made such application to other companies unknown to the defendant. It also alleged that the testator had falsely answered that he had not had bronchitis, or spitting of blood, while in fact he had had these diseases:

Held, that the defendant was properly required to furnish to the plaintiffs a bill of particulars, containing a statement of the companies which the defendant expected to prove had refused to insure the testator's life, together with the dates of such applications and refusals, and also a statement of the particular times and places at which it expected to prove that the testator had had spitting of blood, or bronchitis, before the making of the application in question. (*Dwight* agt. *Germania Ins. Co.*, 22 *Hun*, 167.)

8. The defendant alleged that the evidence upon which it relied to establish the existence of these diseases, consisted of oral and written statements of the testator, which statements did not specify the precise time and place at which he had had them:

Held, that the order should be so drawn as to provide that neither the bill of particulars, nor anything in the order, should prevent the defendant from giving evidence of any declarations or statements, oral or written, made by the testator, as to his having had the said ailments, which declarations or statements were general as to time and place. (*Id.*)

BROOKLYN.

See RAILROADS.

The People agt. *Long Island Railroad Company*, ante, 395.

BURDEN OF PROOF.

See ARREST.

Matter of Benson, ante, 314.

1. In a suit by a vendor to recover goods from one claiming title under a fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value. (*Stevens* agt. *Brennan*, 79 *N. Y.*, 254.)

2. Surrender by sheriff of property attached without calling a sheriff's jury throws upon him burden of showing that property was not subject to attachment. (*See Mumper* agt. *Rushmore*, 79 *N. Y.*, 19.)

3. When burden of proof is upon party producing ballot-boxes and ballots in city of Brooklyn as evidence under the act chapter 575, Laws of 1872, to show that the boxes have been kept undisturbed and inviolate. (*See People ex rel.* agt. *Livingston*, 79 *N. Y.*, 279.)

4. In an action in the nature of a *quo warranto*, as between the relator and the defendant, the burden is upon the former to make out a better title to the office than that of the latter; while, as between the people and the defendant, the latter may be called upon to show that his possession of the office is lawful. The production of a certificate of election from the proper officer is however sufficient. (*People ex rel.* agt. *Perley*, 80 *N. Y.*, 624.)

5. In action on check against drawer, presumption in favor of its validity and burden is upon defendant to show want of consideration. (*See Raubitschek* agt. *Blank*, 80 *N. Y.*, 478.)

BURIAL.

1. The question as to the right to select the place of burial of deceased must be solved upon equitable grounds. While there is property in the burial lot, in the monuments, in the ornaments and decorations of the deceased or his

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- grave, there is none in the remains themselves. (*Snyder* agt. *Snyder*, ante, 368.)
2. Since the common law cannot protect or bestow them as property or afford an adequate remedy in cases which sometimes occur, equity will be invoked to grant such protection and give such remedies as seem to be required by the circumstances, and are in consonance with the feelings of mankind. (*Id.*)
 3. The person having charge of the remains hold them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them; in case of a contention the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all the circumstances. (*Id.*)
 4. In a contention between the widow of the deceased (who was his second wife) and his only son and heir (being the child of his first marriage), as to the disposition of his remains after taking into consideration all the circumstances:
Held, that the claim of the son was to be preferred. (*Id.*)
 2. A service, therefore, of a copy of a referee's report, and notice of filing, did not operate to limit the time to serve a case or exceptions. (*Id.*)
 3. Accordingly, *held*, that the rule of the supreme court (*rule 34 of 1858, rule 47 of 1871 and 1874, and rule 32 of 1877*), requiring a case to be served within ten days after written notice of the decision or report, was in conflict with the Code, and consequently inoperative. (*Id.*)
 4. The practice, in this respect, was not changed by the provision of the Code of Civil Procedure (*sec. 994*), providing that exceptions, taken after trial, may be taken "at any time before the expiration of ten days after service * * * of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon." (*Id.*)
 5. While, under this provision, exceptions may be taken at any time after trial, they are not required to be taken until ten days after notice of judgment; and although no provision is made as to time for serving the case, as the case is required to contain the exceptions (*Code, sec. 997*), it need not and cannot be served until after the exceptions are framed; and the party cannot be put in default for not serving a case containing them, before the expiration of the time allowed for framing them. (*Id.*)

CASE.

1. Under the provision of the Code of Procedure, in reference to making a case for the purposes of review, in an action tried by the court or a referee (*sec. 268*), the ten days allowed for that purpose did not begin to run until the entry of judgment, and notice thereof; the alternative stated therein, "or within such time as may be prescribed by the rules of the court," meant such further time as might be prescribed. (*French* agt. *Powers*, 80 N. Y., 146.)
5. *It seems*, that where a report of a referee, and notice of filing thereof, were served prior to the going into effect of the Code of Civil Procedure (*Sept. 1, 1877*), but no judgment had been entered, that even if the practice had been changed by the said Code, and

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the rule validated, the notice would not have become operative to limit the time for making a case to ten days after the Code went into effect; as the notice when served did not operate to limit the time, the new provision could not retroact to give it that effect, and a new notice should have been served. (*Id.*)

CAUSE OF ACTION.

1. Where goods are sold on different days, each sale constitutes a separate and distinct cause of action, and the plaintiff may, at his election, bring separate actions for each, or for all of them together. (*Zimmerman et al. agt. Erhard et al., ante, 163.*)

CERTIORARI.

1. Prior to the adoption of sections 2125 and 2126 of the Code of Civil Procedure, there was no statute nor rule of law prescribing any fixed period within which a writ of *certiorari* must be applied for, but the decision of that question was left to the discretion of the court to which the application was made. On April 5, 1879, the defendant, the Mayor of New York, certified to the governor that he had removed the relator from his office of police commissioner. From that time until January 27, 1880, when the case of *The People agt. Nichols* was decided by the court of appeals, the right of the relator to review such removal by a writ of *certiorari* was in dispute. On February 2, 1880, the relator applied for and obtained a writ of *certiorari*:

Held, that the court below properly held that he was guilty of no laches which would authorize a denial of the writ. (*People ex rel. Smith agt. Cooper, 22 Hun, 515.*)

2. Upon the return of an order requiring the relator to show cause

why he should not be attached for a criminal contempt, in forcibly and willfully resisting the lawful order and process of the court, such proceedings were had that the court adjudged him to have been guilty of the said contempt, and ordered that he be imprisoned in the county jail for thirty days and pay a fine of \$250:

Held, that for the purpose of reviewing these proceedings upon a *certiorari*, they must be deemed to have been terminated by the entry of the final order convicting the relator of the contempt, and sentencing him to pay the fine and be imprisoned, and that it was error to quash the writ on the ground that the proceedings were not terminated, because no warrant of commitment had yet been issued. (*People ex rel. Gilmore agt. Donahue, 22 Hun, 470.*)

3. A decision overruling a demurrer interposed to an indictment, and directing that judgment be given for the People, unless the accused plead over, cannot be reviewed upon a *certiorari* before a judgment has been entered on the decision. The court cannot review the decision before entry of judgment, even though the counsel for both of the parties agree that it may so review it. (*People agt. Beman, 22 Hun, 283.*)
4. The supreme court may, upon application of the prosecution, issue a writ of *certiorari* to remove an indictment into that court from the oyer and terminer. (*Jones agt. People, 79 N. Y., 45.*)
5. As to whether a *certiorari* may be brought for that purpose without the consent and in spite of the authority of the supreme court, *quære.* (*Id.*)
6. It is not necessary to give notice of application for the writ. (*Id.*)
7. It is discretionary with the supreme court after having obtained

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jurisdiction of the case either to quash the writ upon cause shown, to remand the case to the oyer and terminer, or to proceed to its disposition as in other cases pending before it. (*Id.*)

8. Accordingly, *held*, that an order of the supreme court refusing to quash such a writ was not reviewable here. (*Id.*)
9. Costs of appeal in proceedings by common-law *certiorari* are not allowable; whether the proceedings come here upon appeal from a judgment or from an order superseding the writ. (*People ex rel. Smith agt. Village of Nelliston*, 79 N. Y., 638.)

CODE OF PROCEDURE.

1. Section 71—An action will lie on a judgment of the United States circuit court, though it has been docketed, without first having obtained leave of the court. (*See Goodyear Dental Vulcanite Co. agt. Frisselle*, 22 Hun, 174.)
2. Section 92—Under the provision of this section of the Code of Procedure limiting the time for bringing an action to recover a penalty to three years, where an action is brought against a trustee of a manufacturing corporation, to charge him with a debt because of failure of the corporation to file an annual report, more than three years after January twentieth of the year when the alleged failure occurred, the action is barred; as upon that day, if at all, the cause of action accrued. (*Knox et al. agt. Baldwin*, 80 N. Y., 610.)
3. Section 95—In an action to recover a balance alleged to be due upon a store account, for goods sold and delivered, where the defense was the statute of limitations, it appeared that defendant

had delivered to plaintiff small quantities of butter and eggs at different times to be credited upon the account:

Held, that the action was "upon a mutual, open and current account, where there have been reciprocal demands between the parties," within the meaning of the provisions of this section of the Code of Procedure, which declares that in such case the cause of action shall be deemed to have accrued from the time of the last item proved; and that as the last item was within six years the claim was not barred. (*Green agt. Disbrow*, 79 N. Y., 1.)

4. Sections 187, 211, 277, 288—Defendant H., having been arrested upon an order of arrest issued in an action to recover the possession of personal property, was discharged from arrest upon giving to the sheriff an undertaking, in and by which the sureties under took that H. should "at all times render himself amenable to the process of the court, * * * and for the payment to the plaintiffs of such sum as may, for any cause, be recovered against the defendant," instead of an undertaking for the delivery of the property to the plaintiff, if delivery be adjudged, etc., as prescribed by the Code of Procedure (*secs.* 187, 211). In an action upon the undertaking, *held*, that the final clause therein, *i. e.*, as to payment, was to be construed in connection with the provision of said Code (*sec.* 277), directing the form of judgment in such an action; and that, as so construed, it was not an absolute undertaking to pay the value of the property, but only to pay on condition that no delivery can be had; but that the undertaking was void as having been taken *colore officii*, within the meaning of the statute (2 R. S., 286, *sec.* 59), for the reason that it bound the sureties for the amenability of H. to process, an obligation which could

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not be required from H. as a condition of his relief.

It was claimed that this provision in the undertaking should be rejected as surplusage, for the reason that an execution against the body could not issue on the judgment in the action, and so that no liability could arise under the clause in question:

Held, untenable, as an execution against the body could have been issued (*Code, sec. 288*), after a return unsatisfied of an execution against the property of H. (*Cook et al. agt. Freudenthal, 80 N. Y., 202.*)

5. Section 207 — The provision of the charter of the city of Buffalo of 1870 (*sec. 23 chap. 519, Laws of 1870*), declaring that goods and chattels upon lands for which taxes are assessed shall be deemed to belong to the person to whom the lands are assessed, does not apply to property belonging to another person in no way liable for the tax which is transiently upon lands assessed, but in the possession of the owner for his own purposes; and the collector cannot lawfully, by virtue of his warrant, take such property, for the purpose of satisfying the tax.

Where such property is so taken, an action by the owner to recover the possession thereof, may be maintained against the collector.

The property in such case cannot properly be said to be taken for a tax within the meaning of the provision of this section of the Code of Procedure, requiring an affidavit for the claim and delivery of property to show that the property has not been taken for a tax, or of the provision of the Revised Statutes (2 *R. S.*, 522, *sec. 4*), which provides that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax," etc. (*L. S. and M. S. Ry Co. agt. Roach et al., 80 N. Y., 339.*)

6. Section 227 — Attachment — the

appearance of the defendant does not revive an attachment, invalidated by a failure to serve the summons within thirty days. (*See Blossom agt. Estes, 22 Hun, 472.*)

7. Section 268 — Under the provision of this section of the Code of Procedure, in reference to making a case for the purposes of review, in an action tried by the court or a referee, the ten days allowed for that purpose did not begin to run until the entry of judgment, and notice thereof; the alternative stated therein, "or within such time as may be prescribed by the rules of the court," meant such further time as might be prescribed.

A service, therefore, of a copy of a referee's report, and notice of filing, did not operate to limit the time to serve a case or exceptions.

Accordingly, *held*, that the rule of the supreme court (*rule 34 of 1858, rule 47 of 1871 and 1874, and rule 32 of 1871*), requiring a case to be served within ten days after written notice of the decision, or report was in conflict with the Code, and consequently inoperative. (*French agt. Powers, 80 N. Y., 146.*)

8. Section 292 — Supplementary proceedings cannot be instituted on a justice's judgment for less than twenty-five dollars, exclusive of costs. (*See Wolf agt. Jordan, 22 Hun, 108.*)
9. Section 304 — costs in county court when the recovery is less than fifty dollars — what the plaintiff must show to entitle himself to them. (*See Tompkins agt. Greene, 21 Hun, 257.*)
10. Section 309 — The act (*chap. 569, Laws of 1869, as amended by chap. 192, Laws of 1874*), in relation to fees of sheriffs and referees on foreclosure sales, in the city and county of New York, was not repealed by the amend-

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ment of 1876 to this section of the Code of Procedure, which limits the sum to be allowed for fees on such a sale. The amendment simply modified the act by fixing the maximum of fees, leaving the scale of charges, up to this limit, as fixed by said act. (*Schermerhorn et al.*, agt. *Prouty et al.*, 80 N. Y., 317.)

11. Section 311—Upon the dismissal of an appeal costs cannot be taxed by a judge under. (*See Andrews agt. Long*, 22 Hun, 24.)

12. Section 399—Where a party was called as a witness by the adverse party, and was examined as to a transaction with a deceased party in reference to which he would have been precluded from testifying in his own behalf under this section of the Code of Procedure:

Held, that the witness was entitled, upon cross-examination, to explain his testimony, and to state the whole transaction. (*Merritt agt. Campbell*, 79 N. Y., 625.)

13. Section 399—After the plaintiff had given testimony on the trial as to transactions with C., one of the defendants, but before his examination was completed, C. died:

Held, that the death of C. did not authorize the striking out of the testimony; that this section of the Code of Procedure had no application, as the disqualification under that section depended entirely upon the facts existing when the testimony was given, not upon any change subsequently occurring. (*Comins agt. Hetfield*, 80 N. Y., 261.)

14. Section 399—Defendant and H. negotiated for the exchange of certain real estate; the terms were agreed upon verbally by them; defendant was to pay a sum agreed upon as the difference in the values of the lands to be exchanged; he gave to H. a check for \$500, as a payment, receiving

therefor a receipt signed by H. In an action upon the check, parol evidence was given as to the contents of the receipt, it having been lost, which was to the effect that it stated that the check was received on account of the exchange of said lands, specifying them, and then stated the terms, *i. e.*, the price of each piece of property, the amount of mortgages to be executed, etc.; it did not appear that the terms of credit were specified. Defendant thereafter refused to enter into a written contract, as was agreed, and stopped payment of the check:

Held, that the burden was upon defendant to show a failure of consideration; that as it did not appear that the terms of credit were not in the receipt, as every presumption was in favor of the validity of the check, this was to be presumed; that the receipt taken in connection with the check contained the material elements of a contract, sufficient and valid under the statute of frauds, and enforceable in equity against H.; and that, therefore, there was a good consideration for the check.

Plaintiff held the check as assignee of H., who died prior to the trial:

Held, that defendant was incompetent, under section 399 of the Code of Procedure, to testify to the personal transactions between him and H. (*Raubitschek agt. Blank*, 80 N. Y., 479.)

15. Section 428—The jurisdiction and power of the courts was not affected by the provision of this section of the Code of Procedure, abolishing the writ of *quo warranto* and proceedings by information in the nature thereof; it is only the form of the proceeding that was done away with. The remedies theretofore had in those forms may now be obtained by civil action. (*People ex rel. Hatzel et al. agt. Hall*, 80 N. Y., 117.)

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16. Section 430 of the Code of Procedure expressly declares it to be the duty of the attorney-general, "on leave granted by the supreme court or a judge thereof," to bring an action "for the purpose of vacating the charter, or annulling the existence of a corporation, other than a municipal," which has thus conducted itself.

The power conferred, and duty imposed, upon the attorney-general by this section of the Code of Procedure has not been in any wise impaired or affected by the act of 1853, or any other statute. (*The People* agt. *Globe Mutual Life Insurance Company*, ante, 82.)

CODE OF CIVIL PROCEDURE.

1. Section 14—Upon the return of an attachment against defendant for an alleged contempt in disobeying the provision contained in a judgment of divorce herein, which required him to pay alimony and to give security for the payment thereof; and upon motion to vacate the attachment the court adjudged him to be in contempt, and ordered him to pay a fine, to give security in a specified amount for future alimony, and to stand committed until compliance with the order:

Held, that the whole matter was before the court and it had jurisdiction to grant such relief.

The attachment was issued upon proof of service of copying of the judgment, with demand of payment of the alimony in arrear, with the costs, and the giving security as required by the judgment, and proof of defendant's failure to comply therewith:

Held, that the papers served were sufficient to authorize the issuing of the writ (*Code of Civil Procedure*, sec. 14); that the judgment contained all that was necessary to advise defendant of the nature of the claim made against him.

Defendant claimed that the attachment should have been

vacated, because based on his refusal to pay costs:

Held, untenable, as it was issued for "disobedience to the lawful mandate of a court" (*Code of Civil Procedure*, sec. 14, sub. 3); and that the provision of the statute of 1847 (sec. 2, chap. 39), *Laws of 1847*, prohibiting imprisonment for contempt in not paying costs, had no application. (*Park* agt. *Park*, 80 *N. Y.*, 156.)

2. Section 66, as amended in 1879—Lien of an attorney under, for costs—superior to right of set-off. (*See Ennis* agt. *Curry*, 22 *Hun*, 584.)

3. Section 66, as amended in 1879—When an attorney must have given notice of the assignment of a part of the recovery to him in order to justify his moving to set aside a settlement entered into between the parties. (*See Jenkins* agt. *Adams*, 22 *Hun*, 300.)

4. Section 66—The amendment to this section of the Code of Civil Procedure, passed in 1879, gives to the attorney of record, from the commencement of an action or the service of an answer containing a counter-claim, a lien upon his client's cause of action or counter-claim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after the judgment.

But no new remedy is provided for the enforcement of the lien, and, in order to make it available in the case of a settlement before judgment, the attorney, while he need no longer prove fraud or collusion, must still go on with the litigation until judgment, which is to be perfected for costs only. (*McCabe* agt. *Fogg et al.*, ante, 488.)

5. Section 158—What damages may be recovered against a sheriff in

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- an action for an escape—when evidence of the insolvency of the debtor inadmissible. (*See Dunford agt. Weaver*, 21 Hun, 349.)
6. Section 191—Sureties to an undertaking given on an appeal to the court of appeals—when they are liable for all the costs of the action. (*See Burdett agt. Lowe*, 22 Hun, 588.)
7. Sections 191, 194—Under the provisions of these sections of the Code of Civil Procedure, requiring a party, on appeal from an order granting a new trial, to stipulate for judgment against him in case of affirmance, and directing this court, in such case, to render judgment absolute upon the right of the appellants; also authorizing such proceedings in the court below upon the remittitur as are necessary to render the judgment effectual, the judgment must be absolute against the appellant upon the whole matter and right in controversy in the action.
- Where, therefore, an order, reversing a judgment in favor of plaintiff and granting a new trial, is affirmed on appeal to this court, and judgment absolute ordered, in an action wherein the answer sets up a counter-claim, defendant is entitled to such judgment upon the remittitur as the facts alleged by him in his answer entitle him to. (*Hiscock et al. agt. Harris et al.* 80 N. Y., 402.)
8. Section 375—When the statute of limitations is no defense in proceedings instituted under, to charge a joint debtor not personally served. (*See Maples agt. Mackey*, 23 Hun, 228.)
9. Sections 383, 385—Though, as a general rule, a sheriff who under execution has levied upon and sold certain property as belonging to the defendant in the execution, will not be permitted, when called upon to account for the proceeds, to allege that the property in fact did not belong to said defendant. Yet, when upon motion to compel payment of surplus such defendant has put himself on record, under oath, that the property taken belonged to his wife, and that he had no interest therein, his right to recover the alleged surplus is not so clear that the court should enforce it on a summary application.
- Such motion does not come under the one year limitation prescribed by section 385 of the Code of Civil Procedure, but under the three year limitation, as prescribed by section 383. (*Frankel agt. Elias*, ante, 74.)
10. Section 419—Where the plaintiff fails to make the indorsement upon the summons as required by this section of the Code of Civil Procedure, he is only entitled to fifteen dollars costs before notice of trial. (*Adams agt. Ward*, ante, 288.)
11. Section 420—Where the case is one where no application is necessary to the court for judgment upon the complaint if no answer had been served, the plaintiff, on decision of demurrer, is only entitled to fifteen dollars for costs before notice of trial. (*Id.*)
12. Sections 432, 1780—Where plaintiffs, residents of this state, have a cause of action against defendants, a foreign corporation, arising upon the sale and delivery of personal property made by their brokers, a service upon the president of such corporation while passing through this state was sufficient to commence a suit, although his presence here had no relation whatever to the corporation or to his official duties, irrespective of the question whether or not the corporation has property within the state, or whether the cause of action arose therein. (*Pope agt. Terre Haute Car Manufacturing Company*, ante, 419.)

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13. Section 450—In an action to foreclose a mortgage upon real property, the wife of the owner of the equity of redemption may, under this section of the Code of Civil Procedure, appear and defend, by her own attorney, as though she were single. (*Janinski agt. Heidelberg*, 21 *Hun*, 439.)

14. Section 484—The plaintiff, as surviving executor of George J. Price, sues defendant individually, and as sole acting executor of his father (who with plaintiff was co-executor of said Price), for an accounting and damages and other relief, alleging that defendant's testator, who, as such co-executor, took the exclusive control and management of Price's estate, committed various wrongful acts, set forth, in relation thereto, imperiling it; charging misconduct in relation to said estate on the part of defendant since the death of his father, the books and vouchers in relation to said estate having then come into his possession; and setting up that the widow and children of plaintiff's testator, to whom said testator devised the income of his estate during his children's minority, the principal to be then paid to them, are still living and of full age:

Held, overruling demurrer to the complaint, that an executor not only has the right to call his co-executor to account in a suit in equity, but a foreign executor may be held amenable to like authority to prevent either a complete or partial failure of justice, and to maintain and enforce a trust; defendant being accountable for his testator's misconduct to the extent of the latter's assets in his hands.

The complaint states a sufficient cause of action under this section of the Code. (*Price agt. Brown*, ante, 511.)

15. Section 484—A cause of action for damages for malicious trespass

by the original defendants for the erection and continuance of brick stacks, and another for the removal of these stacks and for injunction against their maintenance and continuance, are improperly joined as against the successors in interest of the original defendants, who are made parties by a supplemental complaint reviving the action.

As the newly made parties cannot be charged in tort, the two causes of action do not affect all the parties to the action, as required by this section of the Code. (*Equitable Life Assurance Society agt. Schermerhorn*, ante, 477.)

16. Section 501—When a counter-claim is not based upon a contract as required by, and should be stricken out. (*See Clapp agt. Wright*, 21 *Hun*, 240.)

17. Section 501—Counter-claim—what may be pleaded as such, as being "connected with the subject of the action." (*See Carpenter agt. Manhattan Ins. Co.*, 22 *Hun*, 49.)

18. Section 514—A denial by plaintiff in his reply, upon information and belief, of allegations in defendant's answer, is insufficient where the facts set up in the answer are clearly within the plaintiff's knowledge as appears by the averments in his complaint. (*Fallon agt. Durant*, ante, 178.)

19. Sections 521, 1204—The referee did not exceed his power in giving to one defendant affirmative relief against his codefendant; these sections of the Code being sufficient warrant for the decision and judgment. (*Derham agt. Lee*, ante, 334.)

20. Sections 524, 526—Under the Code of Civil Procedure, a party has no right to interpose an unqualified denial in a verified answer, unless it be founded upon personal knowledge; and where he has no positive knowledge, but has knowledge or information

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sufficient to form a belief, he is not only permitted, but bound, at his peril, to deny upon information and belief. (*Brotherton* agt. *Downey*, 21 *Hun*, 436.)

21. Section 537 — Since the adoption of the Code of Civil Procedure, the plaintiff can no longer treat an answer as a nullity, and enter a judgment as upon a default; his only remedy in such a case is to apply to the court or a judge thereof, upon notice, as prescribed in this section of the said Code. (*Decker* agt. *Kitchen*, 21 *Hun*, 332.)

22. Section 537 — Under section 247 of the Code of Procedure, where "a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly." This practice is not changed, but remains the same under this section of the Code of Civil Procedure.

In an action brought in the courts of this state to enforce the judgment and decrees of the courts of a foreign state or country, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint will be stricken out as sham where the defendant appeared in the original action. (*Roblin* agt. *Long*, ante, 200.)

23. Section 544 — A supplemental complaint should not be allowed upon an *ex parte* application.

Notwithstanding the mandatory language of this section of the Code of Civil Procedure, it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application, therefore, should be upon notice, so that both parties may be heard. (*Fleischmann* agt. *Bennett*, 79 *N. Y.*, 579.)

24. Section 548 — As to whether the writ of *ne exeat* was abolished by the Code of Procedure, *quære*.

Such a writ was issued herein in March, 1869. A motion was made in May, on the part of defendant, to vacate the writ and the order for its issue, or to reduce the amount of bail, and that a sum deposited with the sheriff be restored, and for general relief. The motion appears to have been founded on the merits; it did not appear in the notice of motion, or in any of the papers, that the ground of want of power was taken. The order made upon the motion simply directed a reduction of the bail and a return of the money deposited in excess of the amount fixed; no further disposition of the motion to vacate was made. An appeal was taken in January, 1879. On appeal to this court, *held*, the presumption was that all that was presented to or passed upon by the special term was the right of defendant to relief upon the facts, that under the circumstances, as the question is not distinctly presented by the order appealed from, and as this section of the Code of Civil Procedure has declared in terms that the writ is thereby abolished, thus rendering the question of no practical importance, so far at least as future cases are concerned, the court would not review the many decisions of the supreme court, prior to the New Code, holding the writ not abolished. (*Collins* agt. *Collins*, 80 *N. Y.*, 24.)

25. Section 549, subdivision 4, as amended in 1879 — what must be shown to authorize the issuing of an order of arrest thereunder. (*See Easton* agt. *Cassidy*, 21 *Hun*, 459.)

26. Section 552 — Under this section of the Code of Civil Procedure, a defendant may be arrested in an action brought in this state upon a judgment recovered in a circuit court of the United States, pro-

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vided he might have been so arrested had the original action been brought here. (*Baxter* agt. *Drake*, 22 *Hun*, 565.)

27. Sections 568, 769—Motion to vacate an order of arrest—where it must be made. (*See Sutton* agt. *Sabey*, 22 *Hun*, 557.)

28. Section 572—A motion under this section of the Code of Civil Procedure, to discharge a defendant held in actual custody under an order of arrest, on the ground that the plaintiff has neglected to enter judgment in the action within one month after it was in his power so to do, need not be made in the judicial district or in the county adjoining the judicial district in which the action was triable, but may be made to a judge of the court in which the action was commenced, within the county where the defendant is held in custody.

The right of the defendant to a discharge depends upon the fact of his being held in actual custody, and not upon the fact that the plaintiff or his attorney knew that he had been surrendered by his bail, and was so held. (*Sumner* agt. *Osborn*, 22 *Hun*, 13.)

29. Section 572—*Supersedeas*—when a defendant is not in actual custody so as to authorize an application for it. (*See Watt* agt. *Healy*, 22 *Hun*, 491.)

30. Section 572—How far the old practice relating to *supersedeas* is affected by. (*See Watt* agt. *Healy*, 22 *Hun*, 491.)

31. Sections 603, 604—When action is not within, so as to entitle party to a temporary injunction. (*See Buffalo Grape Sugar Co.* agt. *Alberger*, 22 *Hun*, 349.)

32. Section 613—Stay of proceedings after entry of judgment—when it cannot be granted with-

out security being given. (*See Eastman* agt. *Starr*, 22 *Hun*, 465.)

33. Section 618—Stay of proceedings after entry of judgment—when it cannot be granted without security being given. (*See Eastman* agt. *Starr*, 22 *Hun*, 465.)

34. Sections 635, 636, 683—Where the facts set forth in the affidavits, upon which the attachment was granted, were that the defendant purchased the goods in question August 6, 1880, on a credit of thirty days from September 15, 1880; that the goods was obtained by false and fraudulent representations; stating the negotiations which entered into the sale, the representations alleged to have been made, and that such statements were false; shows in what respect it is claimed they were false, and points out the indebtedness existing at the time; then makes a general allegation that "the defendant has assigned and disposed of his property with intent to defraud his creditors; that after purchasing said goods, the defendant shipped about one-half of them to auction houses in other cities, and sold the same at auction. After this allegation follows a general charge that the defendant, on October 12, 1880, made a general assignment, with preferences:

Held, that there was sufficient in the papers to justify an order of arrest, admitting the facts in the affidavits to be true, but there was not sufficient to justify the attachment.

Where the party made an assignment in October, the goods being bought in August, and there being preferences to creditors whom he owed, the court cannot assume from that fact that there was a fraudulent disposition of his property:

Held, further, that the attachment must be reversed, for the reason that there was no connection between the previous acts and

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the assignment to prove the assignment to have been made with a fraudulent intent, or to warrant that conclusion. (*Achelis et al. agt. Kalman, ante, 491.*)

35. Section 636—The defendants had in store for plaintiff a quantity of coffee, to be held for it, with liberty to sell, and to pay the plaintiff, out of the proceeds, the amount due upon bills of exchange which it had discounted on the security of the property. The defendants sold the coffee, using the proceeds, which were more than sufficient to pay the drafts, in their business:

Held, upon a motion to vacate an attachment granted upon these facts, that the modified wording of this section of the Code of Civil Procedure has not changed the provision of section 227 of the former Code in this respect, and that the attachment cannot be sustained, because it has not been shown that the debtors either assigned, disposed of, or secreted, or were about to assign, dispose of, or secrete their property, with the intent to defraud their creditors.

Held, that the provision as to attachments differs in this respect from that providing for the making of an order of arrest; so that a debtor is liable to arrest, but not to seizure of his property by attachment, when he may have disposed of plaintiff's property or that of any other person with intent to defraud its owner. (*German Bank of London agt. Dash, ante, 124.*)

36. Section 636—It matters not what a person believes or disbelieves, the applicant for an attachment under subdivision 2 of this section of the Code of Civil Procedure, must show by proof of facts known to the witnesses who testify to them, that the belief in the intent to defraud by a disposition of the property is well founded. In other words the intent so to defraud must be a fair

and logical sequence from facts proved.

It is not enough that a witness is willing to testify to a fact positively; he will not be allowed to so testify, when it is plain that he can have no actual knowledge on the subject. The sources of information must be given, so that the tribunal called upon to act can see that the facts sought to be proved are established by legitimate testimony. (*Ellison agt. Bernstein, ante, 145.*)

37. Sections 636-632—A purchaser, from a defendant in an action, of certain property against which an attachment has been issued, may, under section 632 of the Code of Civil Procedure, move to vacate the attachment.

The attachment was properly vacated, on the ground that the affidavit did not show that the plaintiff was entitled to recover a sum stated therein over and above all counter-claims known to him (*Code of Civil Procedure, sec. 636.*)

Where the motion to vacate the attachment is made upon the papers on which the warrant is granted, the plaintiff cannot put in additional affidavits in support of the attachment. (*Trow's Printing and Bookbinding Company agt. Hart, ante, 190.*)

38. Section 636—What an affidavit for an attachment must state. (*See Donnell agt. Williams, 21 Hun, 216.*)
39. Sections 767, 1347, 1348—The decision of the judge in settling the interrogatories is an order (*Code, sec. 767*); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable (*Code, secs. 1347, 1348*). (*Uline agt. N. Y. C. and H. R. R. Co., 79 N. Y., 175.*)

40. Sections 769, 568—Motion to vacate an order of arrest—where it must be made. (*See Sutton agt. Sabey, 22 Hun, 557.*)

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41. Section 757 — Under this section of the Code of Civil procedure, as amended in 1879, providing that, "in case of the death of a sole plaintiff or defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest," it is the duty of the court to continue the action, if it survives or continues, without regard to whether or not the applicant has been guilty of laches in making the motion. (*Greene* agt. *Martine*, 21 *Hun*, 136.)
42. Section 770 — Any application, except for a new trial upon the merits, which elsewhere must be made in court, may, in the first judicial district, be made at any time to a judge out of court. (*Boucicault* agt. *Boucicault*, 21 *Hun*, 431.)
43. Section 820 — The provision of this section of the Code of Civil Procedure for interpleader by order is a substitute for the old action of interpleader, and is governed by the same principles. It appeals to the equitable discretion of the court.
Such an application ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity. (*Pustet et al.* agt. *Flannelly*, ante, 67.)
44. Section 829 — Does not apply to an action against an executor individually. (*See Hall* agt. *Richardson*, 22 *Hun*, 444.)
45. Section 829 — What not a personal transaction or communication within — Inferences to be drawn from ambiguous facts shall be left to the jury. (*See Hill* agt. *Heermans*, 22 *Hun*, 455.)
46. Section 829 — When testimony of grantee is inadmissible after death of grantor, as to personal transactions had with him. (*See Moyer* agt. *Moyer*, 21 *Hun*, 67.)
47. Section 829 — The provision of this section of the Code of Civil Procedure, prohibiting a party from testifying, in certain cases, to a personal transaction with a deceased person, does not extend to transactions with the agents of such person. (*Pratt* agt. *Elkins*, 80 *N. Y.*, 198.)
48. Section 829 — F., the maker of the note, for whom H. signed as surety, who was a party defendant, but who did not answer, as a witness for the defense, was permitted to testify to personal transactions between himself and the intestate:
Held, error; that the witness was "a person interested in the event," within the meaning of this section of the Code of Civil Procedure, and was, therefore, incompetent; also, *held*, that the fact that plaintiff subsequently testified as to the facts sworn to by F. did not cure the error. (*Church* agt. *Howard*, 79 *N. Y.*, 415.)
49. Section 834 — The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (*Code of Civil Procedure*, sec. 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in any thing he so learned:
Held, that the evidence was

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competent. (*Pierson* agt. *The People*, 79 N. Y., 424.)

50. Section 834—For the purpose of showing the falsity of representations of the insured as to the cause of death of his mother, defendant called a physician who testified that he attended her in her last illness; it did not appear that he ever visited or saw her at any other time or in any other than a professional capacity. The witness was then asked if he knew or was able to state the cause of her death; if he observed the symptoms she exhibited in her sickness; if the symptoms were such as might have been discovered by observation and physical examination, without the aid of any specific statement from the patient, or without their being confidentially disclosed by her, or any friend or attendant, or through any private examination; and also if the statement of the insurer as to the cause of death was true:

Held, (EARL, J., *dissenting*), that the questions, so far as material, were properly excluded.

The statute prohibiting a physician from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to prescribe. (2 R. S. 406, sec. 73; *Code of Civil Procedure*, sec. 834), includes information received through the sense of sight as well as that communicated through the ear. It needs not that an examination of a patient should be private to exclude information so derived; nor is it required that it should be shown in the first instance by formal proof that the information was necessary to enable the physician to prescribe.

The statute includes all knowledge acquired from the patient himself, from the statements of others surrounding him, and from observation of his appearance and symptoms.

The death of the patient does not remove the prohibition, and the physician cannot testify to the cause of death learned by him while attending the patient in a professional capacity.

A witness, not a physician, who saw the mother of the insured in her last sickness, was asked to state his conclusion in reference to the character of her disease. This was objected to and excluded:

Held, no error. (*Grattan* agt. *The Metropolitan Life Ins. Co.*, 80 N. Y., 282.)

51. Section 835—What communication between attorney and client not privileged under. (*See Root* agt. *Wright*, 21 Hun, 344.)

52. Section 872—Since the amendment which was made in 1879 to subdivision 6 of this section of the Code of Civil Procedure, it is requisite and necessary, in an affidavit on which an application is made for the examination of witnesses where no action is pending, to state what the circumstances are which render it necessary for the protection of the applicant's rights that the witnesses' testimony should be perpetuated.

The meaning of the amendment to subdivision 6 is to require the applicant to show that he is in danger of losing the evidence of his right before it could be judiciously investigated. To prove that such danger exists it is incumbent on the complainant to allege that he has an interest, present or contingent, in the property, and that the defendant has or claims to have an interest. He is further bound to show that he is in danger of losing his witnesses by sickness, age, death or departure from the jurisdiction, or that his case rested upon the evidence of only one witness. Where he could at once bring a suit, he is bound to show that it has been commenced. If no action is pending, he is obliged to explain why he is not

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able to maintain an action, the ordinary reasons being that the right of action belonged to the adverse party, or that the adverse party had raised some impediment (an injunction for example) to an immediate trial in a court of law. (*Matter of Ketchum's Application*, ante, 154.)

53. Sections 875, 876 — Examination of a party before trial — power of the court to refuse or limit the extent of it. (*See Harrold* agt. *New York*, &c., *R. R. Co.*, 21 *Hun*, 268.)

54. Section 892 — *It seems*, that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (*Code of Civil Procedure*, sec. 892), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not.

The power to exclude questions, however, should be sparingly exercised. (*Utine* agt. *N. Y. C. and H. R. R. Co.*, 79 *N. Y.*, 175.)

55. Section 911 — An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial (*Code*, sec. 911). (*Id.*)

56. Sections 929, 930, 931 — A copy of an account of defendant's firm as it appeared in the ledger of a foreign corporation, no objection being made for want of proper verification, was properly admitted as presumptive evidence, under these sections of the Code, of the account of work done by the firm for the corporation. (*Derham* agt. *Lee*, ante, 334.)

57. Section 974 — Not designed to send a counter-claim made by a defendant to a jury, in an action which is referable by reason that the trial will involve the examination of a long account. (*Brooklyn*,

&c., *R. R. Co.* agt. *Reid*, 21 *Hun*, 273.)

58. Section 974 — *It seems* that the provision of this section of the Code of Civil Procedure, in reference to the mode of trial when defendant interposes a counter-claim and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. (*Cook* agt. *Jenkins*, 79 *N. Y.*, 575.)

59. Section 982 — Where an action relating to surplus moneys on a foreclosure must be brought. (*See Flies* agt. *Buckley*, 23 *Hun*, 551.)

60. Section 982 — This action was brought in the county of New York to restrain the defendant Johnson, who had in his possession a satisfaction piece of a judgment recovered by the plaintiff against the defendant Nelson, from delivering the same to Nelson. The complaint showed that Nelson owned real property in Ulster, but none in Kings county. The defendant, upon an affidavit stating that Nelson had sold the land in Ulster county, and then owned no real estate except in Kings county, moved for an order changing the place of trial to Kings county, on the ground that the action was brought "to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property, or a chattel real," within the meaning of this section of the Code of Civil Procedure:

Held, that whether or not the action was within that section must be determined by the complaint, and that the decision of that question could not be affected by affidavits. That the action did not have for its object the recovery of a judgment establishing or otherwise affecting a right, lien,

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or other interest in real property, and that the motion was therefore properly denied. (*Knickerbocker Life Ins. Co. agt. Clark*, 22 Hun, 506.)

61. Sections 994, 997—Under the provision of these sections of the Code of Procedure, in reference to making a case for the purposes of review, in an action tried by the court or a referee, the ten days allowed for that purpose did not begin to run until the entry of judgment, and notice thereof; the alternative stated therein, "or within such time as may be prescribed by the rules of the court," meant such further time as might be prescribed.

A service, therefore, of a copy of a referee's report, and notice of filing, did not operate to limit the time to serve a case or exceptions.

Accordingly, *held*, that the rule of the supreme court (*rule 34 of 1858, rule 47 of 1871 and 1874, and rule 32 of 1877*), requiring a case to be served within ten days after written notice of the decision, or report was in conflict with the Code, and consequently inoperative.

The practice, in this respect, was not changed by the provision of the Code of Civil Procedure (*sec. 994*), providing that exceptions, taken after trial, may be taken "at any time before the expiration of ten days after service * * * of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon."

While under this provision exceptions may be taken at any time after trial; they are not required to be taken until ten days after notice of judgment; and although no provision is made as to time for serving the case, as the case is required to contain the exceptions (*Code, sec. 997*), it need not, and cannot be served until after the exceptions are framed, and

the party cannot be put in default for not serving a case containing them, before the expiration of the time allowed for framing them.

The exceptions referred to in said provision are not simply those taken on the trial.

It seems, that where a report of a referee, and notice of filing thereof, were served prior to the going into effect of the Code of Civil Procedure (*Sept. 1, 1871*), but no judgment had been entered, that even if the practice had been changed by the said Code, and the rule validated, the notice would not have become operative to limit the time for making a case to ten days after the Code went into effect; as the notice when served did not operate to limit the time, the new provision could not retroact to give it that effect, and a new notice should have been served. (*French agt. Powers*, 80 N. Y., 146.)

62. Section 999—Upon what grounds a motion for a new trial on the minutes of the judge may be made. (*See Robson agt. New York Central, &c., R. R. Co.*, 31 Hun, 387.)

63. Section 999—This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time.

Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception.

This rule has not been changed by the provision of this section of the Code of Civil Procedure, in reference to the granting of a new trial by the judge presiding at the trial.

For such errors, *it seems*, the general term has power to grant a new trial in its discretion, although no exceptions were taken

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on the trial. (*Standard Oil Co. agt. Amazon Ins. Co.*, 79 N. Y., 506.)

64. Section 1003 — Where feigned issues in an action are tried by a jury, and the judge presiding at the trial neither entertains a motion for a new trial nor directs exceptions taken at the trial to be heard at the general term, a motion for a new trial can only be made under this section of the Code of Civil Procedure at the special term, where the motion for final judgment is made, and before such judgment. (*Chapin agt. Thompson*, 80 N. Y., 275.)

65. Section 1005 — The provision of this section of the Code of Civil Procedure providing for a motion for a new trial after judgment, has reference to a new trial of the action itself, not to a new trial upon the feigned issues which may have been awarded therein. (*Id.*)

66. Section 1013 — Power of the court to order a compulsory reference under. (*See Dane agt. Liverpool, &c., Ins. Co.*, 21 Hun, 259.)

67. Section 1021 — Demurrer — an interlocutory judgment must be entered upon the decision of an issue of law. (*See Liegeois agt. McCracken*, 22 Hun, 69.)

68. Section 1023 — Judge or referee cannot make additional findings on settlement of case — so far as rule 23 conflicts with this section it is inoperative. (*See Palmer agt. Phoenix Ins. Co.*, 22 Hun, 224.)

69. Section 1059 — Upon the trial of an indictment for murder, the prisoner challenged the array of jurors on the ground that, an order having been granted requiring the drawing of additional jurors, one of the boxes required to be kept by the clerk, *i. e.*, that containing the names of jurors who had attended a term of the court, and served, had not been kept,

and was not brought into court as required by this section of the Code of Civil Procedure. The challenge was sustained; the prisoner thereupon withdrew it; a jury was impaneled and the trial proceeded:

Held, that the prisoner could withdraw his challenge, and that he thereby waived the irregularity. (*Pierson agt. The People*, 79 N. Y., 424.)

70. Section 1204 — Where in an action for damages alleged to arise from the breach of a written contract to do advertising, a joint liability is charged against numerous defendants, among whom are C., A. and C., copartners, and the latter defendants answer jointly, admitting that they had dealings with and did advertising for plaintiff, but aver that all such dealings were several as to them and not joint with the other defendants, and thereupon such copartners set up counter-claims in their answer, to which counter-claims plaintiff demurs on the ground that all the defendants in this action are sued on a joint liability, that the said counter-claims are alleged in favor of said defendants separately, and that as between the said defendants and the plaintiff a separate judgment in this action cannot be had:

Held, that a demurrer to such an answer is ill, and that defendants are entitled to judgment for the amount due under their counter-claims.

Held, also, that plaintiff's position would have been well taken under the former common-law rule; but that the Code of Procedure has radically changed the former rule, and that now under this section of the new Code, judgment may be given for or against one or more defendants; that the ultimate rights of parties on the same side, as between themselves, may be determined, and a defendant granted any affirmative relief to which he is entitled. (*Clegg*

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agt. *American Newspaper Union*, ante, 498.)

71. Section 1217 — When judgment cannot be entered by default under. (*See Clarke* agt. *Boreel*, 21 *Hun*, 594.)

72. Section 1279 — J., a naturalized citizen, died in 1866 intestate, and seized of certain real estate. He left him surviving his widow, his father, the defendant B., who was his sister, and the wife of a citizen, and two alien children of a deceased sister, who was an alien. The widow died in 1870. B., in 1873, by judgment in an action of ejectment, wherein she founded her claim upon her title by descent, recovered possession of the premises. She contracted to sell the same to plaintiff, in 1877. Upon submission of the controversy as to her title under this section of the Code of Civil Procedure, *held*, that the title to the premises vested in B., upon the death of her brother, that the act of 1874 (*chap. 261 of Laws of 1874*), amending the said provision of the act of 1845, by inserting after the words "resident alien," the words "or any naturalized or native citizen," could not operate to divest her estate thus acquired, and that, therefore, she could give a good title and was entitled to a performance of the contract. (*Luhre* agt. *Eimer*, 80 *N. Y.*, 171.)

73. Section 1279 — Plaintiff was appointed by said commissioner janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district: the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined

that he was and that the other was not entitled to be paid:

Held, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under this section of the Code of Civil Procedure, as between him and the city, to which C. was not a party. (*Kennedy* agt. *The Mayor*, 79 *N. Y.*, 361.)

74. Section 1323 — Where, under an adverse judgment in an action in the nature of a *quo warranto*, the defendant who was in the possession of the office, having a certificate of election from the duly constituted board of canvassers, was removed from the office:

Held, that upon reversal of the judgment here, the court had power and it was proper to compel restitution of the rights lost by means of the erroneous judgment (*Code of Civil Procedure*, sec. 1323); also, that the court could not look into the case to see which way the merits inclined as between the two contestants; the defendant having the adjudication in his favor required by the statutes, and by virtue of it having held and exercised the office, this is conclusive until the certificate has been corrected or shown to be false by judicial determination (1 *R. S.*, 118, sec. 17). (*People ex rel. Dailey* agt. *Livingston*, 80 *N. Y.*, 66.)

75. Section 1338 — Under this section of the Code of Civil Procedure, where an order of general term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of

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law only. (*Weyer et al. agt. Beach*, 79 N. Y., 409.)

76. Sections 1340, 1342 — When an action must be brought in a court of record, to render an order therein appealable to the general term. (*See Fish agt. Thrasher*, 21 Hun, 15.)

77. Section 1342 — An appeal will not lie to the general term of the supreme court from an order of the county court made in an action commenced in a justice's court, and brought into the county court by appeal. (*Roberts agt. Marson*, 21 Hun, 363.)

78. Section 1342 — The provision of this section of the Code of Civil Procedure, in reference to appeals to the supreme court from orders of a county court, confines the appellate jurisdiction to orders in actions originating in the county court.

Accordingly, *held*, that an order of county court, dismissing an appeal from a judgment of a justice of the peace, was not appealable to the supreme court. (*Andrews agt. Long*, 79 N. Y., 573.)

79. Section 1736 of the Code of Civil Procedure, continuing an action of replevin, notwithstanding the death of either party, in favor of or against his executors or administrators, applies only to actions in which the sole defendant was living on September 1, 1880, and is not retroactive. (*Burnham et al. agt. Brennan*, ante, 310.)

80. Section 1761 — The right of a defendant in a divorce suit, the judgment in which prohibited him from marrying again, to make application under section 49 of the Laws of 1879, for a modification of such judgment, is saved by the repealing act of 1880; and this section of the Code of Civil Procedure, containing the disqualification upon re-marriage never became operative law, except as

modified by said repealing act. (*Peck agt. Peck*, ante, 206.)

81. Sections 1781, 1782, 1808, 1810 — The attorney-general, in behalf of the people of the state, may maintain an action "against one or more trustees, directors, managers or other officers of a corporation to procure a judgment * * * compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge," and "compelling them to pay the corporation which they represent, or its creditors, any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost or wasted, by a violation of their duties," and "suspending a defendant from exercising his office when it appears that he has abused his trust" (*Code of Civil Procedure*, sections 1781, 1782).

By section 1808 of the Code of Civil Procedure the attorney-general "must bring an action" for the purposes just enumerated, "if, in his opinion, the public interests require that an action should be brought;" and by section 1810, in an action brought for the objects specified, by the attorney-general, the court has power to appoint a receiver of the property of the corporation.

When the president of a railroad company makes a contract with himself for the construction of a railway; when he obtains all the securities, stock and bonds under the pretense of paying the nominal contractor; when as chief engineer he makes to himself as contractor certificates of work done, and then as president pays himself many hundred thousand dollars in advance of what the nominal contractor was entitled to receive under the contract for construction, ample cause is shown for the appointment of a receiver, and the command of the statute to the attorney-general that he "must

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bring an action," becomes imperative.

Although it is true that, under section 1782 of the Code of Civil Procedure, a creditor of the corporation, or a trustee, director, manager or other officer of the corporation could bring an action, not to suspend or remove a director, but to recover for the corporation the assets and property which its officers had wasted, it is:

Held, that an action which had been so brought by K., one of the directors and one of the defendants herein, in which P., one of the defendants herein was made receiver, is no bar to the action brought by the state through its attorney-general as required by section 1808 of the Code. (*The People* agt. *Bruff*, ante, 1.)

82. Sections 2125, 2126—Writ of *certiorari*—within what time an application therefor must be made. (*See People ex rel. Smith* agt. *Cooper*, 22 *Hun*, 515.)

83. Sections 2234, 2235, 2245, 2247—In proceedings for forcible entry and detainer under title 2 of chapter 17 of the Code of Civil Procedure, the main question for determination is whether the party charged entered by force upon one, having previously a peaceable possession, under claim of right, and whether the person whose possession was invaded has been held out by force.

These provisions do not cast upon the magistrate the burden of examining and determining conflicting titles to real estate. (*Kelly* agt. *Sheehy et al.*, ante, 430.)

84. Section 2264—By the provisions of this section of the Code of Civil Procedure a receiver cannot be appointed before an order or warrant, to be examined, is served upon the judgment debtor, without ten days' notice to the judgment debtor, unless he cannot, after due diligence, be found in

the state. (*Morgan* agt. *Von Kohnstamm*, ante, 161.)

85. Section 3307—Under subdivision 4 of this section of the Code of Civil Procedure the sheriff is entitled to three term fees after that Code took effect, although he had previously received three term fees. (*Little et al.* agt. *Coyle et al.*, ante, 76.)

86. Section 3232—It is proper to allow costs on the decision of a demurrer, though an issue of fact is left to be determined upon a trial. (*Adams* agt. *Ward*, ante, 288.)

87. Section 3267—Items for copies of documents cannot be allowed without an affidavit that it or they were actually and necessarily used or obtained for use. (*Id.*)

88. Section 3268—Before the additional chapters of the Code of Civil Procedure went into operation (*i. e.*, September 1, 1880) it was necessary for a plaintiff residing in another county bringing an action in this court to file security for costs, but the Code, as amended has changed the law on this subject.

An order made on the 13th day of April, 1880, directing a plaintiff, who was a resident of Brooklyn, to file security for costs, held to be correct as the law then was. (*Wiley* agt. *Arnoux*, ante, 137.)

89. Section 3271—A plaintiff suing executors will, under this section of the Code of Civil Procedure, be required to give security for costs where it is made to appear by affidavit that he is pecuniarily irresponsible and unable for that reason to pay costs, although the action is concededly brought in good faith. (*Murphy* agt. *Travers*, ante, 301.)

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COMMISSION (TO TAKE TESTIMONY).

1. *It seems*, that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (*Code of Civil Procedure, sec. 892*), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not. (*Uline agt. N. Y. C. and H. R. R. R. Co., 79 N. Y., 175.*)
2. The power to exclude questions, however, should be sparingly exercised. (*Id.*)
3. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. (*Id.*)
4. The decision of the judge in settling the interrogatories is an order (*Code of Civil Procedure, sec. 767*); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable (*Code, secs. 1347, 1348*). (*Id.*)
5. As to whether the party has a remedy in such case by *mandamus* to compel the allowance of the question, *quære*. (*Id.*)
6. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial (*Code, sec. 911*). (*Id.*)
7. In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued, on behalf of defendant, to

take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff, after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied, and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed:

Held, error. (*Id.*)

COMPLAINT.

1. In an action against a ministerial officer for executing a process valid upon its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void can have no greater force than a previous recital of the facts, which shows that it was authorized and valid, and a demurrer to such pleading in a complaint must be sustained. (*Clark agt. Bowe, ante, 98.*)
2. Where the complaint was founded upon the alleged false and malicious statement that he, plaintiff, adulterated sugar, that he cheated the government, and that, being guilty of cheating the government, he swore that he did not do so:
Held, that these three charges are neither singly nor collectively actionable *per se*, but may become actionable by reason of surrounding circumstances to be pleaded and proved, from which the fair inference can be drawn that the words used were spoken and understood in such a way as to presumptively work an injury.
Held, further, that where these surrounding circumstances are not set forth, the meaning of the

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words cannot be enlarged by pleading an innuendo, for the office of an innuendo is by a reference to a preceding matter, to fix more precisely the meaning. (*Havemeyer* agt. *Fuller*, ante, 316.)

3. It may help to explain, but it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred. It cannot be used to establish a new charge, for it is not the nature of an innuendo to beget an action. (*Id.*)

4. As an innuendo cannot perform the office of a colloquium, showing by extrinsic matter that the words charged are actionable cannot be supplied by an innuendo attributing to those words a meaning which render them actionable. (*Id.*)

5. Where the special damage is the foundation of the cause of action, it is a material allegation and must be fully and accurately stated. (*Id.*)

6. Where, as in this case, the complaint on its face shows that the only manner in which the plaintiff is engaged in business is as a member of a business firm, the name of the firm not being given nor the interest of the plaintiff. For all that appears, plaintiff's name may not appear in that firm name. It sufficiently appears, however, that the loss complained of is not a loss directly to the plaintiff, but to the firm:

Held, that even if it be conceded, as a general proposition, that in case of slander against a member of a partnership individually, he is the proper party plaintiff, even though the firm be also injured by the speaking of the words, it is nevertheless necessary, especially where the words become actionable only by reason of their influence in plaintiff's calling, that the injury to plaintiff's inter-

est should be specially averred. (*Id.*)

7. A plaintiff who brings an action for slander, by which he lost his customers in trade, ought in his declaration to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false. The general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury. (*Id.*)

8. Where a complaint contains a statement of the facts necessary to constitute two distinct causes of action, the failure of the plaintiff to separately state and number them, cannot be urged as a ground for a nonsuit at the trial; if there be any doubt as to which cause of action the plaintiff intends to rely upon, the remedy of the defendant is by a motion to make the complaint more definite and certain. (*Commercial Bank* agt. *Pfeiffer*, 22 *Hun*, 327.)

9. A complaint before a police magistrate to the effect that the complainant had heard and believed a person to be a common prostitute, without stating the source of his information, or the grounds of his belief, will not justify the magistrate in proceeding with the trial of the person on such charge. (*People ex rel. Kingsley* agt. *Pratt*, 22 *Hun*, 300.)

COMPOSITION AGREEMENT.

1. If a composition agreement provides for a *pro rata* payment to all the creditors of a debtor, a secret agreement to pay one of the creditors more than his *pro rata* share to induce him to unite in the composition is a fraud upon the other creditors. It violates the principles of equity and the mutual confidence between creditors. A note or other security given under such a secret agreement

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cannot be enforced. (*Solinger* agt. *Earle*, ante, 116.)

2. But if a negotiable note be given by a friend of the insolvent, not related to him by blood, the friend is a mere volunteer; and if the friend's note be transferred by the payee to an innocent holder, to whom the friend is obliged to pay it, he cannot, under such circumstances, recover back the money paid. (*Id.*)

COMPTROLLER OF STATE.

1. The relator, an appraiser duly appointed by the superintendent of the insurance department, having presented an itemized bill for services as such appraiser, which bill was approved by said superintendent, the duties of the comptroller of the state, under the acts of 1873 and 1879 requiring him then to audit such bill were confined to an examination for the purpose of seeing whether the preliminary steps required by law had all been taken; and he had no power arbitrarily, and on his own sense of right and justice, either to increase, decrease or reject the bill altogether, because the charges as made did not meet his approval. (*Matter of Murphy*, ante, 258.)

CONSTITUTIONAL LAW.

1. Chapter 604, Laws of 1874, entitled "An act to provide for the surveying, laying out and monumenting of certain portions of the city and county of New York, and to provide means therefor," is not unconstitutional for the reason that being a local act the subject of opening streets is not expressed in its title as required by section 16 of article 3 of the constitution. (*Matter of One Hundred and Thirty-eighth street*, ante, 290.)
2. An act of the legislature, provid-

ing for the length of the term of office of supervisors in four counties of the state, is a local bill within the meaning of section 18 of article 3 of the constitution, and is therefore void. (*People ex rel. Hassell* agt. *Hoffman*, ante, 324.)

3. Chapter 253 of the Laws of 1878 held unconstitutional. (*Id.*)

See RAILROADS.

The People agt. *Long Island Railroad Company*, ante, 395.

CONTEMPT.

1. Where an order was made by a county judge declaring a judgment debtor in contempt, the order being made on the return of an order to show cause, the same having been duly served on the debtor, but without his presence and without the appearance of anyone in his behalf:

Held, that it being taken against the debtor by default it was competent for him to move to set it aside for irregularity. The moving party was bound to make a case for the granting of the order on the merits, at least, the same as if the debtor had appeared and objected to the proceeding; and if he failed to make his case the debtor might and should move to set the order aside rather than to appeal. (*Tinke* agt. *Langdon*, ante, 180.)

2. Can an appeal be taken from an order obtained by default for non-appearance? *Quære*. (*Id.*)
3. Although a county judge may, under section 298 of the Code of Procedure, appoint a receiver in supplementary proceedings, it seems doubtful whether he is authorized by law to order a conveyance by the debtor of his property to a receiver or to direct its delivery and possession to that officer. (*Id.*)

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4. To punish as for a contempt for refusing to deliver property to a receiver, an order requiring such delivery is a necessary prerequisite. A simple demand of possession is not sufficient. (*Id.*)
5. Where the order appointing the receiver directed the debtor to assign and convey his lands and real estate, but contained no directions to the debtor to surrender its possession:
Held, that he could not be held in contempt for omitting or refusing to do what had not been commanded or required of him. (*Id.*)
6. In contempt proceedings a fine cannot be properly imposed arbitrarily and capriciously; but it must have a basis upon proof of damages or injury. (*Id.*)
7. A defendant who fails to pay over to the plaintiff money to enable her to carry on a suit for divorce, as ordered, is liable to arrest; his inability to pay it is no defense to an application for his commitment — 2 Revised Statutes, 538, section 20, is only applicable to those actually imprisoned. (*See Strobbridge* agt. *Strobbridge*, 21 *Hun*, 288.)
8. Upon the appearance of a debtor before a judge, in pursuance of an order for his examination in proceedings supplementary to execution, he admitted that he had in his possession money and property sufficient to satisfy the judgment, and requested a postponement to enable him to apply the same upon the judgment. The judge thereupon made an order reciting the facts, and granting him until a day named to pay the judgment with interest, and the costs, and providing in default thereof that he be adjudged guilty of a willful contempt; it further ordered and directed that, in that case, he pay to the sheriff a fine of \$384, and be imprisoned until the payment thereof, and that a commitment
- issue to carry this judgment into effect:
Held, that the defendant could only be convicted of contempt upon the return of an attachment or an order to show cause, and that the court could not thus summarily declare the consequences of a disobedience to its orders. (*Tinker* agt. *Orooks*, 22 *Hun*, 579.)
9. To authorize the court to punish a party for contempt in proceedings supplementary to execution, in refusing to pay over money or property in pursuance of its order, it must appear that the specific property or sum of money was, at the time of the service of the order for his examination, in his possession or under his control. (*Id.*)
10. An order punishing for contempt, in violating an injunction, can only be reviewed upon the merits or for alleged legal error, on appeal from the order. (*Watrous* agt. *Kearney*, 79 *N. Y.*, 496.)
11. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. (*Id.*)
12. Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings. (*Id.*)
13. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney, who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred to take

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proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report:

Held, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order. (*Id.*)

14. Upon the return of an attachment against defendant for an alleged contempt in disobeying the provision contained in a judgment of divorce herein, which required him to pay alimony and to give security for the payment thereof; and upon motion to vacate the attachment the court adjudged him to be in contempt, and ordered him to pay a fine, to give security in a specified amount for future alimony, and to stand committed until compliance with the order:

Held, that the whole matter was before the court and it had jurisdiction to grant such relief. (*Park agt. Park*, 80 N. Y., 156.)

15. The attachment was issued upon proof of service of copy of the judgment, with demand of payment of the alimony in arrear, with the costs, and the giving security as required by the judgment, and proof of defendant's failure to comply therewith:

Held, that the papers served were sufficient to authorize the issuing of the writ (*Code of Civil Procedure*, sec. 14); that the judgment contained all that was necessary to advise defendant of the nature of the claim made against him. (*Id.*)

16. Defendant claimed that the attachment should have been vacated, because based on his refusal to pay costs:

Held, untenable, as it was issued for "disobedience to the lawful mandate of a court" (*Code of Civil*

Procedure, sec. 14, sub. 3); and that the provision of the statute of 1847 (sec. 2, chap. 390, *Laws of 1847*), prohibiting imprisonment for contempt in not paying costs, had no application. (*Id.*)

17. Defendant commenced an action in the marine court of New York city against plaintiff to recover a deposit, which was also claimed by another party. In that action costs of appeal from an order had been awarded defendant. Plaintiff thereupon commenced this action for an interpleader and procured a temporary injunction restraining defendant, her attorneys, etc., from further prosecuting or carrying on the former action, or from taking any steps to recover said deposit. Defendant's attorney thereafter issued a precept for the collection of the costs. In proceedings to punish said attorney for contempt, *held*, that the injunction did not prohibit the collection of the costs, and that the attorney was justified in issuing the precept. (*German Sav. Bank agt. Habel*, 80 N. Y., 273.)

CORPORATIONS.

1. A stockholder has no right by the inherent powers of a court of equity to bring suit to wind up the business of a corporation. (*Bliven agt. Peru Steel and Iron Company*, ante, 280.)
2. If a stockholder may proceed under 2 Revised Statutes, 463, section 38, which provides for dissolution when the corporation has been insolvent for a year, or has neglected or refused for a year the payment of its debts, or has suspended its business for a year, the plaintiff has not made out such a case. It is only a *judgment* creditor who can apply for sequestration under 2 Revised Statutes, 463, section 36. A creditor whose claim has not been prose-

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cuted to judgment cannot so proceed. (*Id.*)

9. A consent or acquiescence by the trustees of a corporation to a judgment not authorized by the statute, cannot be substituted for the methods so prescribed. (*Id.*)

See PRACTICE.

The People agt. *Bruff*, ante, 1.

COSTS.

1. Before the additional chapters of the Code of Civil Procedure went into operation (*i. e.*, September 1, 1880) it was necessary for a plaintiff residing in another county bringing an action in this court to file security for costs, but the Code, as amended, has changed the law on this subject. (*Wiley* agt. *Arnoux*, ante, 137.)
2. An order made on the 13th day of April, 1880, directing a plaintiff, who was a resident of Brooklyn, to file security for costs, held to be correct as the law then was. (*Id.*)
3. Upon an appeal to the supreme court from the decree of the surrogate removing an executor and guardian, it is proper that infant respondents should appear by different attorney than adults and tax separate bill of costs, upon affirmance. (*Savage* agt. *Gould et al.*, ante, 255.)
4. From the service of the petition of appeal, the proceedings, so far as the question of costs were concerned, are to be regarded in this court, viz., costs of proceedings, before and after trial, of argument and term fees. (*Id.*)
5. Code of Procedure, section 307, not applicable to such appeals. (*Id.*)
6. It is proper to allow costs on the decision of a demurrer, though an issue of fact is left to be determined upon a trial. (*Adams* agt. *Ward*, ante, 288.)
7. Where the plaintiff drew the demurrer and served it and noticed the argument thereof, for such services, he is entitled to the costs before and after notice of trial, as well as twenty dollars for a trial of an issue of law. (*Id.*)
8. Items for copies of documents cannot be allowed without an affidavit that it or they were actually and necessarily used or obtained for use. (*Id.*)
9. Where the case is one where no application is necessary to the court for judgment upon the complaint if no answer had been served, the plaintiff, on decision of demurrer, is only entitled to fifteen dollars for costs before notice of trial. (*Id.*)
10. Where the plaintiff fails to make the indorsement upon the summons as required by section 419 of the Code of Civil Procedure, he is only entitled to fifteen dollars costs before notice of trial. (*Id.*)
11. A plaintiff suing executors will, under section 3271 of the Code of Civil Procedure, be required to give security for costs where it is made to appear by affidavit that he is pecuniarily irresponsible and unable for that reason to pay costs, although the action is concededly brought in good faith. (*Murphy* agt. *Travers*, ante, 301.)
12. Under the provisions of section 3251 of the Code of Civil Procedure, a party is entitled to tax ten dollars for each witness examined before trial. (*Marston* agt. *Hebert*, ante, 490.)
13. Where a judgment is reversed "with costs to abide the event," and the order is silent as to which party is to receive the costs, it means that they are to go to the

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one ultimately successful. (*First National Bank* agt. *Fourth National Bank*, ante, 436.)

14. To entitle a plaintiff who recovers less than fifty dollars, in an action brought in a county court, to costs, on the ground that a justice's court had no jurisdiction over the action, because it involved accounts exceeding in amount \$400, he must prove not only that the sum of the accounts claimed exceeded \$400, but that the sum of the accounts actually proved upon the trial was in excess thereof. (*Tompkins* agt. *Greene*, 21 *Hun*, 257.)
15. Costs cannot be allowed upon the granting of an *ex parte* order requiring the defendant to file his answer. (*Edlefson* agt. *Duryee*, 21 *Hun*, 607.)
16. When a settlement and discontinuance of an action will be set aside as a fraud upon the attorney's lien for costs. (*See Pickard* agt. *Yencer*, 21 *Hun*, 403.)
17. When an execution against the person may be issued upon a judgment for costs recovered in an action for a tort. (*See Philbrook* agt. *Kellogg*, 21 *Hun*, 238.)
18. Where, in an action brought against several defendants, each appears by a separate attorney and interposes a separate defense, and all succeed in their defenses, each of them is, under section 305 of the Code, entitled to a separate bill of costs, unless the severance be made in bad faith and for the purpose of increasing the costs. In this action, brought against the defendants as copartners, each appeared by a separate attorney and served a separate answer. The defendant Robert, who resided in this state, appeared by a Mr. Sawyer. The defendant James, who was a non-resident, having left the state to avoid his creditors, and having no property herein subject to attachment, was served by publication and appeared by a Mr. Day. The notice of the retainer of Mr. Sawyer for Robert was in the handwriting of Mr. Day, and the answers were identical; that of James being copied and verified in the office of the attorney for Robert:
Held, that the severance of the action was in bad faith, and that but one bill of costs should be allowed to the defendants. (*Williams* agt. *Cassady*, 22 *Hun*, 180.)
19. Where an application is made by defendants, who have successfully interposed separate defenses, to have separate bills of costs taxed, under section 305 of the Code, the clerk has no power to refuse to allow them so to do, on the ground that the separate defenses were unnecessarily and collusively interposed. The remedy of the party aggrieved is to apply to the court by a motion, for the relief sought. (*Id.*)
20. Where a person brings an action, in the name of the overseer of the poor, to recover a penalty for a violation of the provisions of the excise law, without having first made complaint to the said overseer of the alleged violation, accompanied with reasonable proof thereof, the action is unauthorized, and such person is personally liable to the defendant for the costs thereof. To authorize a private person to bring such an action, the complaint made to the overseer of the poor should be so definite, and should be accompanied with such proof, as to satisfy the overseer that a penalty has been incurred, or to enable him to investigate and decide whether or not there has been a violation of the statute. (*Jobbitt* agt. *Giles*, 22 *Hun*, 274.)
21. When the court of appeals reverses a judgment in favor of the plaintiff, and orders a new trial, with costs to abide the event, and

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on the second trial the plaintiff again recovers a judgment, he cannot tax, in his favor, the costs of the reversal by the court of appeals. (*First Nat. Bank* agt. *Fourth Nat. Bank*, 22 Hun, 563.)

22. Costs awarded upon sustaining a demurrer, interposed by the plaintiff to parts of an answer, are not interlocutory, but final costs, and the plaintiff cannot recover nor assign them until judgment is rendered upon the issues in the action generally. (*Armstrong* agt. *Cummings*, 22 Hun, 570.)

23. Upon the dismissal of an appeal from a county court to the supreme court, the costs must be adjusted by the clerk, upon notice, in the usual way, and they cannot be taxed by a judge of the court, under section 311 of the Code. (*Andrews* agt. *Long*, 22 Hun, 24.)

24. Taxation of—when the party finally succeeding is entitled to the costs of an unsuccessful appeal taken by him. (*See Donovan* agt. *Vandemark*, 22 Hun, 307.)

25. Non-resident—who will be regarded as one, and required to give security for costs. (*See Norton* agt. *Bennett*, 22 Hun, 604.)

26. When sureties to an undertaking given on an appeal to the court of appeals are liable for all the costs of the action. (*See Burdett* agt. *Lowe*, 22 Hun, 588.)

27. Lien of an attorney for, under section 66 of the Code of Civil Procedure, as amended in 1879—superior to right of set-off. (*See Ennis* agt. *Curry*, 22 Hun, 584.)

28. Defendant commenced an action in the marine court of New York city against plaintiff to recover a deposit, which was also claimed by another party. In that action costs of appeal from an order had been awarded defendant. Plaintiff

thereupon commenced this action for an interpleader, and procured a temporary injunction restraining defendant, her attorneys, etc., from further prosecuting or carrying on the former action or from taking any steps to recover said deposit. Defendant's attorney thereafter issued a precept for the collection of the costs. In proceedings to punish said attorney for contempt, held, that the injunction did not prohibit the collection of the costs, and that the attorney was justified in issuing the precept. (*German Sav. Bk.* agt. *Habel*, 80 N. Y., 273.)

29. General term of supreme court has no power to vacate judgment as to costs which has been affirmed by this court, at least where no new facts are presented. (*See Sheridan* agt. *Andrews* [Mem.], 80 N. Y., 648.)

COUNTER-CLAIM.

See REMOVAL OF CAUSE.

Clarkson et al. agt. *Manson*, ante, 45.

1. In an action by the plaintiff to recover for services rendered to the defendant, the latter set up, as a counter-claim, that the plaintiff was a trustee of a manufacturing corporation, and that, by reason of his failure to file the annual report required by law, he had become personally liable for the debts of the company, some of which were held by the defendant at the time of his default, which debts he sought to set off against the plaintiff's claim herein:

Held, that the counter-claim was not based upon a contract, as required by section 501 of the Code of Civil Procedure, and that it should be stricken out. (*Clapp* agt. *Wright*, 21 Hun, 240.)

2. When the plaintiff will not be allowed to discontinue an action against the objection of a defendant, who has interposed a counter-

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- claim. (*See Gwathney agt. Oheat-ham*, 21 *Hun*, 576.)
3. In an action by the plaintiff to recover damages for an alleged conversion of certain wood by the defendant, the latter alleged, as a counter-claim, that the wood in controversy was the product of trees grown upon certain lands upon which it had a mortgage; that the plaintiff, being a junior mortgagee in possession, and knowing that the lands were an insufficient security for the payment of the defendant's mortgage, and that the mortgagor was insolvent, wrongfully and fraudulently, and with intent to cheat and defraud the defendant, and to impair the security of its mortgage, committed waste on the said premises, by cutting the said wood, to the defendant's damage of \$500:
Held, that the cause of action set up in the counter-claim was "connected with the subject of the action," and that it might be pleaded as a counter-claim, though the action was for a tort. (*Carpenter agt. Manhattan Life Ins. Co.*, 22 *Hun*, 49.)
 4. *Quære*, as to whether or not a plaintiff, by replying to a counter-claim, waives his right to insist that the matters therein set up are not the proper subject of a counter-claim. (*Id.*)
 5. The penalty of double the usurious interest paid, given by section 5198 of the U. S. Revised Statutes, to the person paying the same or to his legal representatives, cannot be set up as a counter-claim in an action brought upon the instrument or evidence of debt, but can only be recovered in a penal action brought specially for that purpose. (*Farmers' and Mechanics' Nat. Bank agt. Lang*, 22 *Hun*, 375.)
 6. When sureties cannot avail themselves of counter-claims existing in favor of their principal. (*See Emery agt. Baltz*, 22 *Hun*, 434.)
 7. *It seems*, that the provision of the Code of Civil Procedure (*sec.* 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained, (*Cook agt. Jenkins*, 79 *N. Y.*, 575.)
 8. In an action for a dissolution of a copartnership, and for an accounting between the partners, the answer alleged a violation on the part of plaintiff of a provision in the articles of copartnership, providing for a sale of the good will of the business to such of the partners as should bid the highest price, by his appropriating to himself the good will, and that the same was worth as an asset \$200,000, which he asked to counter-claim against any sum found due the plaintiff. As a further counter-claim, the answer alleged a fraudulent misappropriation by plaintiff of partnership funds:
Held, that the matters so set up did not present a counter-claim, of a separate and distinct cause of action, within the meaning of said section; that the matters set up were proper items to be proved upon an accounting; and that defendant was not entitled to a trial by jury thereon. (*Id.*)
 9. As to whether a separate cause of action could be maintained to recover the value of the good will, or for damages, without an equitable accounting of the copartnership affairs, *quære*. (*Id.*)
 10. The defendant, in an action in a court of record, is not bound to avail himself by way of counter-claim, of an independent cause of action, existing in his favor against plaintiff. The rule in this respect was not changed by the Code.

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(*Brown* agt. *Gallaudet*, 80 *N. Y.*, 413.)

COUNTY COURT.

1. To entitle a plaintiff who recovers less than fifty dollars, in an action brought in a county court, to costs, on the ground that a justice's court had no jurisdiction over the action, because it involved accounts exceeding in amount \$400, he must prove not only that the sum of the accounts claimed exceeded \$400, but that the sum of the accounts actually proved upon the trial was in excess thereof. (*Tompkins* agt. *Greene*, 21 *Hun*, 257.)
2. No appeal lies from an order of the county court denying a motion for a new trial where the action was brought in a court not of record, and subsequently came into the county court on appeal from a judgment of the court below. (*Fish* agt. *Thrasher*, 21 *Hun*, 15.)
3. When an order of, is not appealable to the general term—Code of Civil Procedure, section 1342. (*See Roberts* agt. *Marson*, 21 *Hun*, 363.)
4. The provision of the Code of Civil Procedure (*sec.* 1342), in reference to appeals to the supreme court from orders of a county court, confines the appellate jurisdiction to orders in actions originating in the county court. (*Andrews* agt. *Long*, 79 *N. Y.*, 573.)
5. Accordingly, *held*, that an order of county court dismissing an appeal from a judgment of a justice of the peace was not appealable to the supreme court. (*Id.*)

COUNTY JUDGE.

1. Although a county judge may, under section 298 of the Code of

Procedure, appoint a receiver in supplementary proceedings, it seems doubtful whether he is authorized by law to order a conveyance by the debtor of this property to a receiver, or to direct its delivery and possession to that officer. (*Tinke* agt. *Langdon*, *ante*, 180.)

COURT OF APPEALS.

1. This court does not lose jurisdiction of a cause brought here upon appeal until the remittitur has been filed in the court below, and that court has taken some action thereon. (*People ex rel. Smith* agt. *Village of Nelliston*, 79 *N. Y.*, 638.)
2. Accordingly, *held*, that the court had jurisdiction to make an *ex parte* order correcting a remittitur, which had been filed with the clerk of the court below, but upon which no action had been taken in that court. (*Id.*)

CROSS-EXAMINATION.

1. Of witness—when party cannot discredit witness by contradicting his testimony as to new matter drawn out on. (*See People* agt. *Cox*, 21 *Hun*, 47.)
2. What questions are proper to be put on cross-examination. (*See Clark* agt. *St. James Church*, 21 *Hun*, 95.)

CUSTODY OF CHILDREN.

1. In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An inquiry as to the father's illtreatment of his wife is pertinent as

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bearing upon the father's right to take the children from their mother. (*In the Matter of Pray, ante, 194.*)

DAMAGES.

1. Damages in an action for wrongful discharge from employment are recoverable up to the time of trial (*Limiting Toles agt. Hazen, 57 How. Pr., 516.*) (*Everson agt. Powers, ante, 166.*)

DEDICATION.

See STREET OPENINGS.

Matter of opening Sixty-seventh street, ante, 264.

DEED OF SETTLEMENT.

1. Pascal B. Smith and his wife Harriet executed a deed of settlement whereby \$15,000 (the proceeds of real estate conveyed by Mr. Smith, the dower right in which the wife released, and agreed to relinquish her like interest in all other real estate which her husband owned or might thereafter acquire) was transferred to a trustee to pay the income to the wife during the joint lives of husband and wife, and, upon the death of either, to pay the income to the survivor for life; and, after the death of both, to pay the principal sum, one-half to such persons as each respectively should direct by will, or in case of either or both dying intestate, then the share of such intestate to go to his or her personal representatives:

Held, sustaining a demurrer to the complaint as not stating a cause of action, in a suit to recover Mr. Smith's interest, after his death, under an assignment of such interest made by him in his lifetime, that the wife's release of her claims of dower was a good consideration to sustain the trust, and that the said assignment is a breach of the deed of settlement.

Held, that Mr. Smith having parted with all his interest in the fund and dedicated it to the uses and purposes of the settlement, and failed to exercise the right he reserved, the fund must go in the direction which the deed gives it. (*Mahon agt. Smith, ante, 385.*)

DEFENSE.

See ACTION.

Davidson agt. Holden, ante, 327.

DEMURRER.

1. A bill in equity to dissolve a partnership and to adjudge void certain attachments issued by creditors of the firm, is demurrable by said creditors. As to such creditors the remedy at law against their enforcing said attachments is adequate. The parties can release the attached property by a bond. They can move to vacate the attachments. They can defend on the ground that the court issuing the attachments has no jurisdiction. If such creditors sue in the wrong court, it is not the province of a court of equity to bring them in as parties to answer an allegation to that effect and to have their suit arrested. (*Fielding agt. Lucas et al., ante, 134.*)

See COMPLAINT.

Clark agt. Bowe, ante, 98.

2. Where, in an action brought to recover damages for a failure of the defendant to perform an agreement as to the sale of a plantation, alleged in the complaint to be situated in the state of Louisiana, the defendant, in her answer, set up as a counter-claim that the plaintiff, while in possession of "Live Oaks," "the said plantation," unnecessarily injured, wasted and damaged it to the amount of not less than \$10,000, it nowhere appearing from the said answer, except by reference to the complaint,

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that the plantation was situated in another state, a demurrer to the counter-claim on the ground that the court had no jurisdiction of the subject thereof — as being founded upon an injury to real property situated in another state — cannot be sustained. (*Oragin* agt. *Quitman*, 22 *Hun*, 101.)

3. Where a demurrer interposed to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is sustained, and leave is given to the plaintiff to amend his complaint within twenty days, on payment of the costs, an interlocutory judgment to that effect must be entered before the time, within which the plaintiff must amend his complaint, will commence to run. (*Legeois* agt. *McCracken*, 23 *Hun*, 69)
4. Nor can a final judgment dismissing the complaint, with costs, be entered, until such an interlocutory judgment has been entered. (*Id.*)
5. Where leave to enter the final judgment on the failure of the plaintiff to comply with the terms of the interlocutory judgment is not given by the decision, application for leave to enter it must be made as upon a motion. (*Id.*)

DENIAL.

1. A denial by plaintiff in his reply, upon information and belief, of allegations in defendant's answer, is insufficient where the facts set up in the answer are clearly within the plaintiff's knowledge as appears by the averments in his complaint. (*Fallon* agt. *Durant*, ante, 178.)

DEPOSITIONS.

1. *It seems*, that while a judge, in settling interrogatories to be an-

nexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (*Code of Civil Procedure*, sec. 892), he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not. (*Uline* agt. *N. Y. C. and H. R. R. Co.*, 79 *N. Y.*, 175.)

2. The power to exclude questions, however, should be sparingly exercised. (*Id.*)
3. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. (*Id.*)
4. The decision of the judge in settling the interrogatories is an order (*Code*, sec. 767); if it disallows a pertinent question, it affects a substantial right, and is therefore appealable (*Code*, secs. 1347, 1348). (*Id.*)
5. As to whether the party has a remedy in such case by *mandamus*, to compel the allowance of the question, *quære*. (*Id.*)
6. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial (*Code*, sec. 911). (*Id.*)
7. In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued, on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff, after a cross-interrogatory calling for the salary

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paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed:

Held, error. (*Id.*)

8. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. (*Misland* agt. *Boyn-ton*, 79 N. Y., 630.)

DISCHARGE.

See ARREST.

Matter of Benson, ante, 314.

DISCONTINUANCE OF ACTION.

1. Where plaintiff had commenced an action and obtained an order of arrest against the defendant on the ground of fraudulent representations, which order of arrest had been vacated upon the ground that the alleged fraudulent representations did not apply to the whole cause of action, on motion by plaintiffs for leave to discontinue the action:

Held, that as plaintiff's object in discontinuing is to commence a new action and obtain a new order of arrest, the order of arrest in this action having been vacated, leave to discontinue should not be granted. (*Livermore* agt. *Burdell*, ante, 308.)

2. The courts are opposed to arresting a defendant twice for the same cause of action. (*Id.*)

DISCOVERY.

1. An order for the inspection of the books and papers of a foreign corporation should not require it to produce books, kept and in constant use in its office in a distant state, before a referee in this state, but should direct it to produce and deliver to the plaintiff sworn copies of so much of their contents as relates to the subject-matter mentioned in the order, within a reasonable time, to be designated by the order. (*Ervin* agt. *Oregon R. and N. Co.*, 22 Hun, 566.)

DISTRIBUTION.

See WILL.

Freeman agt. *Smith et al.*, ante, 311.

DISTRICT COURTS.

1. A district court justice has no jurisdiction in summary proceedings to remove a tenant where the premises, which are the subject of controversy, are not within the district in which he was elected. (*The People ex rel. Hambrecht* agt. *Campbell*, ante, 102.)
2. In landlord and tenant proceedings, in the district courts, though the boundaries of the several judicial districts are within the supposed judicial knowledge of the courts, the locality of the streets and avenues and their termini, and the number of houses situated thereon, are not matters of judicial notice; and unless the tenant appears and objects, the proceedings of the justice are not void for want of jurisdiction though the premises from which such tenant was removed be not within the justice's district. (*People ex rel. Gilmore* agt. *Callahan*, ante, 372.)

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DIVORCE.

1. In an action for a limited divorce on the ground of cruel and inhuman treatment, it is unnecessary to sustain the charge that there should be personal violence. (*Kennedy* agt. *Kennedy*, ante, 151.)
2. Threats and menace from which danger to health or life may be apprehended is sufficient, though the cause of apprehension should not only be weighty but such as clearly showing that the duties and obligations of the marriage state cannot be discharged. (*Id.*)
3. Charges of infidelity, made maliciously without probable cause, are sufficient to sustain the action. (*Id.*)

See MARRIAGE.

Kerrison agt. *Kerrison*, ante, 51.
Peck agt. *Peck*, ante, 206.
Thorp agt. *Thorp*, ante, 295.

4. Where, in an action brought by a wife to procure an absolute divorce from her husband, on account of his adultery, the complaint alleges that the adultery was committed with a woman named therein, such woman cannot, upon the failure of the defendant to appear and answer, be made a party to the action, and be allowed to answer and defend the same upon the merits. (*Clay* agt. *Clay*, 21 *Hun*, 609.)
5. The court will, however, require notice to be given to her counsel of all proceedings to take testimony in the action, and will allow her to be present and cross-examine the witnesses produced, to be herself sworn as a witness and give her testimony, and to have summoned and examined such witnesses as she may desire. (*Id.*)
6. Where, in an action brought by a husband to procure a judgment declaring void the marriage contract, on the ground that a former

husband of the wife is still living, and that the former marriage is still in force, it appears that the wife had, before her second marriage, procured, in an action brought by her in a court in this state, having jurisdiction of the person and of the subject-matter, a divorce from her former husband, on the ground of his adultery, the plaintiff cannot go behind the said judgment and show that it was obtained by the fraud and collusion of the parties thereto, and by false testimony. (*Ruger* agt. *Heckel*, 21 *Hun*, 489.)

7. A defendant who fails to pay over to the plaintiff money to enable her to carry on a suit for divorce, as ordered, is liable to arrest—his inability to pay it is no defense to an application for his commitment—2 Revised Statutes, 538, section 20, is only applicable to those actually imprisoned. (*See Strobbridge* agt. *Strobbridge*, 21 *Hun*, 288.)

DOCUMENTARY EVIDENCE.

1. When the respondent cannot produce before the appellate court documentary evidence to sustain the judgment. (*See Moser* agt. *Mayor*, 21 *Hun*, 163.)

EJECTMENT.

1. The judgment or decree of a court possessing competent jurisdiction is not only final as to the subject-matter thereby determined, but also as to every other matter which the parties *might* litigate in the cause, and which they *might* have had decided. (*Masten* agt. *Olcott*, ante 105.)
2. Where, in an action in the supreme court to recover the possession of land, the facts which the plaintiff claims entitles him to recover are that, up to July 10, 1876, he, and those whose estate he

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has, had been in possession of the property under a claim of title for more than twenty years, and that on that day the defendant J. O. unlawfully entered under the defendant A. O. and wrongfully took possession. An action had previously been brought in a justices' court for a trespass upon this identical property (the defendant in that suit being the plaintiff in this action), and the issue which the plaintiff in that action, and one of the defendants in this action tendered in substance, was that on or about the 16th day of June, 1876, by virtue of an agreement with A. O., the plaintiff in that action, became possessed of the land described—which is described by metes and bounds—as a part of the saw-mill lot. He came into possession not as a trespasser but by virtue of an agreement with A. O. He took and became possessed of it as a part of the saw-mill lot. The defendant in opposition tendered the following issue: He denied each and every allegation, and claimed that he had been in possession of the property for the last twenty years:

Held, that the judgment which was recovered by one of the defendants in this action in justices' court against the present plaintiff for a trespass upon this identical property is a bar to this action. (*Id.*)

3. Litigating the question of possession is not trying the title, but it is an issue which can be properly tried and determined in justices' court. (*Id.*)

ERROR (WRIT OF).

1. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial. (*Eighty agt. People*, 79 N. Y., 546.)
2. No exception lies to a refusal to

postpone a criminal trial by reason of the absence of witnesses. (*Id.*)

3. As to whether a case is to be considered here as *res nova* under the provision of the act to enlarge the jurisdiction of the courts of sessions of the city and county of New York (*sec. 3, chap. 337, Laws of 1855, as amended by chap. 330, Laws of 1858*), which authorizes this court in cases coming from the general sessions to "order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence," etc., *quære*. (*Levy agt. People*, 80 N. Y., 327.)

ESTOPPEL.

See EJECTMENT.

Masten agt. Olcott, ante, 105.

See PARTY WALL.

Musgrave agt. Sherwood, ante, 339.

EVIDENCE.

1. The defendant was tried and convicted of administering poison to the wife and children of one Taft, with intent to kill them. On the evening of January 26, 1879, a woman delivered at Taft's house a letter purporting to come from him, inclosing several small packages of what purported to be medicine, but was in fact poison, and instructed her to administer the contents thereof to herself and children. The letter was delivered a few minutes before seven, of a dark evening, and the woman could only be identified by her voice, which was heard by Taft's eldest son, who opened the door, and by Taft's wife, who was in the house.

Mrs. Taft having testified that she recognized the voice to be that of the accused, was asked, on her cross-examination, if she did not ask the son, when he came back

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into the room, who it was that brought the letter, and answered that she did. She was then asked by the prosecution, "What was said between Willie and you about who it was that brought the medicine," and was allowed, against the accused's objection and exception, to testify that Willie said it was Anna Cox, the accused:

Held, that the declaration of the son to his mother was mere hearsay, and that, as there was nothing in the testimony which made his answer competent by way of qualification or explanation, the court erred in admitting it. (*People* agt. *Cox*, 21 *Hun*, 47.)

2. The mother of the accused was called by the defense, and gave evidence tending to show that Anna was at home at the time the letter was delivered. Having stated on cross-examination that she did not know that Anna wrote a letter on the morning of the day the one in question was delivered, she was asked whether she did not tell certain persons named, that Anna had written a letter on the morning of that day, and replied that she did not. Subsequently these persons were called, and allowed, against the accused's objection and exception, to testify that the mother had told them that Anna had written a letter on the morning of that day:

Held, that the mother having made no reference to the writing of the letter on her direct examination, the people, by attempting to prove by her that the daughter had written one on the day in question, made her for that purpose their own witness, and could not thereafter discredit her testimony in regard to it, by showing contradictory statements made to other persons when not under oath. (*Id.*)

The right to cross-examine a witness as to any fact, for the purpose of discrediting him, by contradicting his testimony by other witnesses, is limited to those

matters which tend to contradict, discredit, vary, qualify or explain the testimony given by the witness on direct examination. (*Id.*)

3. Where a certificate of the sale of real estate by a sheriff has been duly filed with and recorded by the proper county clerk, as required by chapter 60 of 1857, such record or a certified copy thereof is evidence of the facts therein contained in all courts and places the same as if the original record were produced, even though the original certificate was not acknowledged by the sheriff, and though no copy thereof was filed in the office of the register of the said county, in those counties in which such an office exists.

The plaintiff brought this action to recover a certain piece of land in the city of New York to which he claimed title by virtue of a sale, under an execution issued upon a judgment against the owner thereof, recovered and docketed in Rensselaer county on December 6, 1864, a transcript of which had been duly filed in the office of the clerk of the city and county of New York, on February 4, 1865. The plaintiff, having proved the execution and delivery to him of a certificate of sale by the sheriff, offered in evidence a deed, executed by the sheriff, containing the usual recitals. Both the certificate and deed stated that the sheriff had sold all the interest the judgment debtor had in the premises on the 6th day of December, 1864.

The plaintiff then called a witness, who produced a printed notice, subscribed in the name of the sheriff and one of his deputies, of the sale of the premises in the usual form, and testified that he saw it published about a little over six weeks before the sale, in one of the newspapers of the city, though he could not recollect the name of the paper; that he saw a like notice posted in different public places in the city, and that

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he was present when the sale was made. Upon the defendant's objection and against the plaintiff's exception, both the notice produced by the witness and the deed were excluded by the court:

Held, that this was error. (*Clute* agt. *Emmerich*, 21 *Hun*, 122.)

4. That the error made in selling the interest which the judgment debtor had in the land on the day the judgment was docketed, instead of that which he had on the day the transcript was filed in New York, could not possibly have misled or injured the defendant, and should have been disregarded. (*Id.*)

5. That the notice produced by the witness and his testimony were sufficient to have justified the jury in finding that the sheriff had given due notice of the sale as required by law. (*Id.*)

6. *Semble*, that the deed itself was presumptive evidence that the sheriff had performed his duty in giving the notices required by law. (*Id.*)

7. Upon the trial of the plaintiff in error for an assault alleged to have been committed upon one John G. Hoster, with a deadly weapon, with an intent to kill him, the prosecution was allowed, against the objection and exception of the plaintiff in error, to show that he had, shortly before the alleged assault, forged the name of the said Hoster to two promissory notes, which notes he had in his possession up to the time of committing the assault:

Held, that the evidence was properly received.

That it tended to establish a motive for the commission of the offense, and was not rendered inadmissible by the fact that it also tended to show the commission of a distinct offense other than that charged in the indictment. (*Pontius* agt. *People*, 21 *Hun*, 328.)

8. The prosecution put in evidence, without objection, a promissory note, bearing the genuine indorsement of the said Hoster, and also an account book kept by the plaintiff in error, in which he had written the said Hoster's name. Subsequently, witnesses called by the prosecution were allowed to compare the signatures alleged to have been forged with the genuine signature and the one written in the account book:

Held no error. (*Id.*)

9. The plaintiff in error claimed that the notes were given to him by Hoster in consideration of an indebtedness due to him for borrowed money, exceeding in amount that of the two notes:

Held, that evidence tending to show that the defendant was at that time embarrassed in his pecuniary circumstances, and pressed by numerous creditors whom he was unable to pay, was admissible, as tending to show that he then had no money to lend. (*Id.*)

10. This action was brought by the plaintiff, who claimed to be the widow of one William Clark, to recover her dower in certain lands devised by the said Clark to the defendant. The latter denied that the plaintiff was ever married to Clark. Upon the trial the plaintiff gave evidence tending to show that on the 12th of October, 1870, she was married to Clark, at his house near Carthage, Lewis county, by a Catholic priest, in the presence of Bridget Foley (her sister) and Catharine Purcell. Two witnesses for the plaintiff, who testified that the marriage ceremony was performed by the priest on the day stated, said that he remained at Clark's house, on that occasion, about two weeks. The priest died before the trial of this action.

The defendant offered in evidence a register of baptisms kept by the priest at his church in Schenectady, containing entries

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in his handwriting showing baptisms performed by him in that city, on the 1st, 6th, 9th, 10th, 16th and 23d of October, 1870:

Held, that the entries in the book were admissible to discredit the testimony of the witnesses, to the effect that the ceremony took place on October twelfth, and that the priest then remained in Lewis county for two weeks.

Held, further, that it was also admissible to show that Bridget Foley, after the date of the alleged marriage, executed a receipt for her sister, and signed it "E. E. Foley, by sister, B. A. Foley." (*Clark agt. St. James Church*, 21 *Hun*, 95.)

11. *Held*, further, that it was proper, on the cross-examination of Bridget, to ask her whether, after the date of the alleged marriage, she had not told one Mathews that she had advised her sister to come away from Clark, and not work there any longer, and that she would make her do so. (*Id.*)

12. A witness for the plaintiff testified to a conversation with Clark, in which the latter admitted that he was married to the plaintiff:

Held, that it was proper, on cross-examination, to ask him if he had not subsequently stated that he did not believe that the plaintiff was married to Clark. (*Id.*)

13. For some years prior to September, 1859, one Simpson Moyer owned and occupied, with his wife and family, a farm of about 100 acres, which was then worth about \$3,500, but was subject to a mortgage of \$1,500. Moyer had then living thirteen children, of whom only one, a son, was of full age and resided in the vicinity. Moyer, being far gone in his last sickness, and desiring to provide for his infant children, executed and delivered a deed of the farm (which was substantially all his

property) to his said son, the defendant, upon the verbal understanding and agreement that the farm should be kept and held by the latter as a home for the family during the minority of the children, and that when the youngest child should come of age, it or its proceeds should be divided among all of them. No consideration was paid by the defendant, nor did he agree to pay any. The father furnished the money to pay for recording the deed, and continued to occupy the farm until the time of his death, which occurred about ten days after the deed was made. After the father's decease the family continued to occupy the farm, paying the taxes and the interest upon the mortgage, keeping the farm in repair, and making some improvements of a permanent nature. The defendant was never in possession of any part of the farm, nor did he ever receive the rents or profits thereof. The defendant having repudiated the trust upon which the farm was conveyed to him, and claimed to be the sole owner thereof, this action was brought by one of the children to have it adjudged that he held the farm as a trustee for the surviving children, and to compel him to convey to them their respective shares therein:

Held, that the action was properly brought and could be maintained. (*Moyer agt. Moyer*, 21 *Hun*, 67.)

14. *Held*, further, that there was no error in admitting oral evidence of what took place in the sick room, when the father caused the deed to be delivered and gave directions as to the recording of it, and advanced the money to pay for so doing. (*Id.*)

15. *Held*, further, that the testimony of the defendant as to what then took place was properly excluded, under section 829 of the Code of Civil Procedure. (*Id.*)

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16. This action was brought upon a judgment recovered by the Rochester Bank against the defendant and others, and which the plaintiff claimed to own, by virtue of an assignment from the bank, and because he was the sole stockholder thereof at the time it ceased to do business. The judgment was recovered on a note made by and discounted for the defendant. The defenses set up in the answer herein were that the plaintiff never became the owner of, or paid value for the judgment; that, if any judgment existed, it belonged to one Clark, and that the plaintiff was not the real party in interest.

Upon the trial the defendant offered to prove by one Eldridge, one of the indorsers of the said note, and one of the judgment debtors, that he had paid the note to the president of the bank, the plaintiff, and requested him to bring the action against himself, the defendant, and another, in order that he might avail himself of the judgment to collect the amount thereof from the other parties. The testimony was rejected on the ground that it was immaterial, and tended to contradict a record, the witness having allowed a judgment by default to be recovered against him on the note:

Held, that it was error to exclude the evidence.

That it did not tend to contradict the record, but only to show an independent agreement affecting the ownership of the judgment.

That the fact that the particular defense sought to be established was not set forth in the answer, was immaterial, as the evidence was not rejected on that ground. (*Brown* agt. *Decker*, 21 *Hun*, 199.)

17. That it was also admissible as tending to show that the bank held the judgment as a trustee for the benefit of Eldridge, and that it did not, therefore, pass to the plaintiff, under the assignment, as part of the assets of the bank. (*Id.*)

18. The plaintiff having applied for a discharge in bankruptcy, entered into a composition with his creditors, by which he paid fifty-five per cent of his debts, and procured a discharge. In negotiating with the defendants, to whom he was then indebted, he asserted a claim for certain zinc of the value of \$132.07, which he claimed to have sold to them, which claim they disputed. It was finally agreed that this claim should be withdrawn from the compromise, the defendants stipulating that in case the plaintiff proved to the satisfaction of Mr. Gould's sons that the zinc was received by them, they would pay to him fifty-five per cent of the \$132.07.

This action was brought to recover for goods, wares, &c., consisting of the said zinc, claimed to have been sold by the plaintiff to the defendants:

Held, that the action should in any event have been brought upon the agreement, and not for the goods sold.

That to recover upon the agreement the plaintiff should have shown that they had proved the delivery of the zinc to the satisfaction of Mr. Gould's sons, or at least that they had produced evidence which should have been satisfactory to them, and that, not having done so, they could not recover. (*Wilson* agt. *Gould*, 21 *Hun*, 446.)

19. This action was brought to charge the holders of stock in a corporation created under chapter 117 of 1853, and chapter 773 of 1870, with certain of the debts thereof. The defendants claimed that the stock was fully paid up, having been issued for the purchase of property necessary for the business of the company. The plaintiffs sought to recover on the ground that the stock had been fraudulently issued for property, the value of which had been greatly over-estimated by the trustees. The company was

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formed for the purpose of laying out and subdividing land into building or villa plots, and improving and selling the same.

Upon the trial, the plaintiff called witnesses, who gave evidence as to the value of the lands purchased by the company; their opinions being based upon the value of the land for agricultural purposes. The defendant called, as a witness, one of the stockholders of the company, who testified that he had made propositions to the company for the purchase of several of the lots, soon after the purchase of the land by the company, and that he offered as much as \$4,000 for a single lot. Upon the plaintiff's motion, so much of the answer as stated the price offered by him and refused by the company, was stricken out:

Held, that this was error. That if the jury should hold that the offer was made in good faith, it would bear with force upon the question as to whether or not there had been a fraudulent overvaluation of the land by the trustees. (*Thurber* agt. *Thompson*, 21 *Hun*, 472.)

20. The acts and declarations of accomplices or confederates, though occurring in the absence of the principal, are admissible against him if there be sufficient evidence to establish, *prima facie*, a combination among them to commit the offense with which the principal is charged. (*Farrell* agt. *People*, 21 *Hun*, 485.)

21. This action was brought to recover a balance due on an account for caps sold and delivered by the plaintiffs to the defendants. The answer was a general denial. Upon the trial, the plaintiffs having proved the manufacture and shipment of the caps, pursuant to a contract, and rested, the defendants proved that the caps were imperfect, in that the crowns were not properly stitched to them and came off, thereby rendering

them unsaleable, and that they had, for that reason, returned them to the plaintiffs. The plaintiffs then offered to disprove the statement made by the defendants as to the alleged defect in the caps; but the evidence was excluded, on the ground that they should have offered the testimony before closing their case:

Held, that it was error to exclude the evidence.

That the plaintiffs were justified in resting their case upon proof of the manufacture and delivery of the goods, and were not obliged to prove that particular defects therein, which the defendants might set up as defense, did not in fact exist. (*Bancroft* agt. *Sheehan*, 21 *Hun*, 550.)

22. The subscribing witnesses to a will should sign the same after it has been subscribed by the testator. (*Rugg* agt. *Rugg*, 21 *Hun*, 383.)

23. One named as an executor in a will is a competent witness in behalf of the proponents thereof, to establish the validity of its execution. (*Id.*)

24. The due execution of a will may be established by other evidence, than or in opposition to the testimony of the subscribing witnesses. (*Id.*)

25. Where, upon the trial of an action brought by one, claiming to have been appointed an attendant upon the marine court, under a particular act, to recover the salary attached to such office, his attention is specifically called to the fact that he has failed to prove an appointment thereunder, he cannot, upon the hearing of an appeal taken by the defendant from a judgment rendered against it, introduce documentary evidence to prove that in fact he was appointed thereunder. (*Moser* agt. *Mayor*, 21 *Hun*, 163.)

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26. Upon the trial of one indicted for a violation of section 4 of chapter 122 of 1876, in failing to provide a child in his custody with suitable food and medicine, photographs of the child taken soon after its removal from the custody of the accused to a hospital, the accuracy of which are established by the testimony of witnesses, are admissible to give an accurate representation of its physique at or about the time of its removal. (*Cowley* agt. *People*, 21 *Hun*, 415.)
27. In an action brought to recover the damages occasioned by an alleged slander, the complaint alleged that by reason of the words spoken, the plaintiff "was greatly injured in his fame, reputation and good name as a physician, and in his earnings, profits and income as such."
Held, that the allegations were not sufficient to allow him to prove special damages in particular instances upon the trial. (*Stiebeling* agt. *Lockhaus*, 21 *Hun*, 457.)
28. When the plaintiff is not bound to prove the existence of a defendant corporation—a general appearance and the service of an answer by the latter amounts to an admission of its corporate existence—in any event, proof of user or corporate acts establish its existence *prima facie*. (*See Derrenbacher* agt. *Lehigh Valley R. R. Co.* 21 *Hun*, 612.)
29. Action to charge, with a firm debt, one who has held himself out to be a member thereof—when the declarations of the person to whom the goods were sold are admissible as against the person sought to be charged. (*See Greenwood* agt. *Sias*, 21 *Hun*, 391.)
30. Action to rescind the sale of goods, on the ground that the purchaser bought them fraudulently, when insolvent—what evidence is admissible to rebut the presumption of fraudulent intent. (*See Schufeldt* agt. *Schnitzler*, 21 *Hun*, 462.)
31. Building contract—agreement that the engineer's certificate shall be final and conclusive—such certificate can only be attacked for fraud, or bad faith on the part of the engineer. (*See Whiteman* agt. *Mayor*, 21 *Hun*, 117.)
32. When a party is not obliged to produce a paper in his possession—when an irrelevant statement of a witness cannot be contradicted to discredit his testimony—a jury may convict on the uncorroborated evidence of an accomplice—what questions may be put to a witness to impeach him. (*See Stape* agt. *People*, 21 *Hun*, 399.)
33. A witness cannot testify as to the impression produced on his mind by a conversation—impeaching the general character of a witness for veracity—what questions cannot be put to the witnesses called to do so. (*See Wilder* agt. *Peabody*, 21 *Hun*, 376.)
34. When the execution and delivery of a new lease is a sufficient declaration of the election of the lessor to enforce a forfeiture of a former lease occasioned by the failure of the lessee to comply with its conditions—after execution of new lease, lessor cannot waive the breach of condition of the first. (*See Allegany Oil Co.* agt. *Bradford Oil Co.*, 21 *Hun*, 26.)
35. Attorney and client—when a communication between them is not privileged—Code of Civil Procedure, § 835. (*See Root* agt. *Wright*, 21 *Hun*, 344.)
36. When evidence of the insolvency of the debtor is inadmissible in an action against the sheriff for an escape. (*See Dunford* agt. *Weaver*, 21 *Hun*, 349.)

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37. In this action, brought by the plaintiff, as the widow of the grantee of the heirs at law of one Honness, to recover a lot of land owned by him, the defendant claimed that he had removed from New Jersey, and come to live upon the lot, and had improved and paid the taxes upon it, under a parol promise of the said Honness to convey the lot to him if he would do so. Upon the trial the defendant was allowed, against the plaintiff's objection and exception, to prove declarations made by Honness to the effect that he was going to give the lot to the defendant, and others to the effect that he had done so:

Held, that as the plaintiff was in privity with the party making the declarations, they were properly admitted against her.

Subsequently the plaintiff gave evidence of declarations made by the defendant to the effect that he had agreed, by parol, to buy the lot of Honness for \$1,100, and that he had paid part, but not all, of the purchase price. Thereafter the defendant was allowed, against the plaintiff's objection and exception, to prove declarations of Honness to the effect that he had borrowed money of the defendant or was owing money to him:

Held, that there was no identity of interest between the plaintiff and Honness, the deceased, as to the personal estate, and that the declarations of the latter that he, Honness, was owing money to the defendant was improperly admitted, being immaterial, and mere hearsay. (*Rose* agt. *Adams*, 22 *Hun*, 398.)

38. The plaintiff's intestate, a milkman, was killed in crossing a railroad at about half-past six o'clock in the morning of January 27, 1879, while seated in a covered wagon driving his horse through a street. He was a healthy and temperate man, and familiar with the locality. The crossing was on

a level with the street, and the track was visible from any point in the street within a space of one hundred and sixty feet of the crossing. Several witnesses, who had no occasion to look for the train, heard it approach the crossing, and one testified that he saw the lights upon it. No evidence as to the conduct of the deceased, at the time of the accident, or as to the cause, was given. In an action to recover the damages occasioned by the death of the plaintiff's intestate, *held*, that there was a failure to prove that the deceased was free from contributing to the accident, and that the plaintiff was properly nonsuited. (*Glen-den* agt. *Sharp*, 22 *Hun*, 78.)

39. The plaintiff, by a written instrument dated October 18, 1872, leased to the defendant twenty-five acres of land, upon which was a bed of iron ore, for the term of five years, and for such further time as he might require to mine all the ore therein, he agreeing to pay to the plaintiff twenty cents for each ton removed, and to remove at least eight thousand tons a year; the agreement binding him to remove all ore where the vein was over fifteen inches in thickness, and leaving it optional with him to do so or not where the vein was of less thickness. In an action brought to recover the sum of \$1,600, claimed to be due for the year ending October 18, 1877, it appeared that the defendant had been in possession of the premises, and uncovered between one and two acres thereof, and that he had paid the sum of \$1,600 for each of the preceding years:

Held, that as the instrument transferred to the defendant the use and occupation of the premises, at a fixed compensation to be paid annually, it was a lease.

That to justify a recovery by the plaintiff, it was not incumbent upon him to show, by express testimony, that there continued to

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be ore upon the premises during the year for which it was sought to recover rent. (*Gilmore* agt. *Ontario Iron Co.*, 22 *Hun*, 391.)

40. In this action, brought against the maker and accommodation indorsers of a promissory note, dated January 28, 1879, and payable one day after date, the indorsers were allowed, against the plaintiff's objection and exception, to prove that they indorsed the note under a verbal agreement with the plaintiff, to whom the note was to be delivered, that they should have until the first of the following June to pay it:

Held, that the evidence was directly inconsistent with, and affected the terms of the note, and that the court erred in admitting it. (*Willse* agt. *Whitaker*, 22 *Hun*, 242.)

41. In an action of ejectment brought against persons claiming title to the land in question, and tenants in possession under them, the plaintiff gave evidence tending to show that the annual use of the premises was worth \$500, the taxes to be paid by the lessee. The defendants then put in evidence the lease given to their tenant, by which a rent of \$525 was reserved; the lessee agreeing to pay the school and road taxes, and the lessors the town, county and state taxes. They then offered to prove that the actual receipts of the rents and profits from the farm, after paying the taxes and expenses, amounted to only \$325 a year:

Held, that the evidence so offered by the defendants bore upon the question as to the value of the use and occupation of the premises, and that the court erred in rejecting it. (*More* agt. *Deyoe*, 22 *Hun*, 208.)

42. In an action on a policy of life insurance, where the assured committed suicide, upon the trial, a brother of the deceased was called

by the plaintiff, and testified that he himself was subject to attacks of disease, during which he remained unconscious for half an hour, or thereabouts. He was then asked whether he knew from the statements of others what he did while thus unconscious:

Held, that the evidence was inadmissible, as being merely hearsay. (*Hagadorn* agt. *Conn. Mut. Life Ins. Co.*, 22 *Hun*, 249.)

43. The plaintiff notified the defendants to produce a letter written to them. Upon the trial the defendants offered to prove that they had delivered it to their assignee in bankruptcy, but did not show who he was, or where he resided, nor that they had made any effort to produce it, or even that they had notified the plaintiff that they had parted with it:

Held, that it was proper to allow the plaintiff to give parol evidence of the contents of the letter. (*Naugatuck Cutlery Co.* agt. *Babcock*, 22 *Hun*, 481.)

44. The ruling of a judge on the trial admitting secondary evidence will not be reversed on appeal, unless it very clearly appears that an error has been committed which has prejudiced the party complaining thereof. (*Id.*)

45. In an action upon an account for goods sold and delivered, defendant's son J., who purchased the goods on defendant's account, after testifying, as a witness for plaintiff, that the principal articles of clothing and groceries for himself and family were obtained of plaintiff, that he often went himself and sent others to plaintiff's store for goods, was asked, and permitted to state under objection and exception, the quantity and amount of articles thus purchased of plaintiff:

Held, no error. (*Green* agt. *Disbrow*, 79 *N. Y.*, 2.)

46. Plaintiff, after proof that de-

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fendant looked over and examined the account upon his books, offered in evidence a paper proved to be a statement of the account so examined; it was objected to on the ground that the account had not been sufficiently proved; no objection was made because of the non-production of the books. The objection was overruled and the statement received:

Held, no error. (*Id.*)

47. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, upon the cross-examination of S., a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if O., his "immediate boss," did not assign these reasons for discharging him, to all of which he answered "No." O. was called by defendant's counsel, who offered to prove by him that he became aware that S. was in the habit of being intoxicated, and neglected his duty, and that he was discharged for that reason. This was excluded:

Held, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency or drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of S. were conclusive; that if such grounds for the discharge were communicated to S., it might lay the foundation of an inquiry as to his feelings toward defendant; but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show a hostile feeling, the question could not be presented here. (*Kirkpatrick* agt. *N. Y. C. and H. R. R. Co.*, 79 *N. Y.*, 240.)

48. Plaintiff, who had invented an improved cotton gin, and had ap-

plied for letters patent therefor, contracted to sell the same to defendants, and to assign the letters patent when obtained, for a sum specified; the contract contained a warranty that said cotton gin would "be equal in all respects to the best saw gin then in use." In an action upon the contract, wherein defendant sets up a breach of the warranty as a defense:

Held, that the testimony of men, competent from education and experience to express an opinion as to whether plaintiff's invention was in fact equal to the best saw gins, was competent; that the inquiry related to a matter which was not the subject of general knowledge, but which depended on facts, from their nature difficult if not impossible to be testified to, and it could only be answered by one having peculiar knowledge and skill in the use of this and other machines. (*Scattergood* agt. *Wood*, 79 *N. Y.*, 263.)

49. Plaintiff having given evidence as to the comparative merits of this and other machines:

Held, that he could not object to the giving of similar evidence on behalf of defendant. (*Id.*)

50. The declarations of a sole administrator or executor, made, when not acting in the discharge of his duties, to third parties having no interest in or connection with a claim belonging to the estate, are not evidence against him in an action brought by him in his representative capacity upon such claim. (*Church* agt. *Howard*, 79 *N. Y.*, 415.)

51. In an action, by an administrator, upon a promissory note, signed by H. as surety, the defense was that the note had been altered, without defendant's consent. A witness called for the defense was asked to state a conversation between her and plaintiff, after the death of the intestate, in rela-

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tion to the note. This was objected to on the ground that the declarations of the administrator were not evidence against the payee of the note. The objection was overruled, and the witness answered, in substance, that plaintiff stated he erased a clause in the note, at the request of the deceased. Plaintiff was not, at the time of the conversation, doing any business in connection with the estate, and the witness had no connection with or interest in the note:

Held, error; and that the objection was sufficient to present the point as to the competency of such admissions. (*Id.*)

52. F., the maker of the note for whom H. signed as surety, who was a party defendant, but who did not answer, as a witness for the defense, was permitted to testify to personal transactions between himself and the intestate:

Held, error; that the witness was "a person interested in the event," within the meaning of section 829 of the Code of Civil Procedure, and was, therefore, incompetent; also, *held*, that the fact that plaintiff subsequently testified as to the facts sworn to by F. did not cure the error. (*Id.*)

53. Another defense was the statute of limitations. H., as a witness in his own behalf, was asked whether he had any interest in the note, or derived any benefit from it. This was objected to on the ground of the incompetency of the witness under said section. The objection was overruled. H. answered that he had not; that he was an accommodation maker, and had never paid any interest on the note, or authorized or directed it to be paid, or knew that any had been paid:

Held, error; that the whole testimony was responsive to the questions put, and all of it was incompetent. (*Id.*)

54. H. was permitted to testify, under objection, that F. told him his name had been taken off the note, and that the intestate said she would see his name was taken off.

Held, error. (*Id.*)

55. So, also, *held*, as to evidence of H., to the effect that he did not suppose he was on the note, and that if he had known it he could have obtained security from F. before his failure. (*Id.*)

56. Also, *held*, that the fact that the case was submitted to the jury on the sole question as to the alteration of the note, did not remedy the error. (*Id.*)

57. The prisoner was accused of having caused the death of W., the deceased, by poison. A physician who was called to see W. when sick from the poison, and who examined and prescribed for him, as a witness for the prosecution was asked to state the condition in which he found W. at that time, both from his own observation and what W. told him; this was objected to on the ground that the evidence was prohibited by the statute (*Code of Civil Procedure*, sec. 834). The court overruled the objection, and the witness stated what he learned from his own examination of W., made in the presence of W.'s wife and the prisoner, and from their statements. There was nothing of a confidential nature in anything he so learned:

Held, that the evidence was competent. (*Pierson* agt. *People*, 79 N. Y., 424.)

58. After evidence had been given, on the part of the people, showing an intimacy between Mrs. W. and the prisoner, who was a married man, before and after the death of W., and that the prisoner disappeared from his home February 19, 1877, eleven days after the death of W., the prosecution called B., a clergyman, who resided

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in Michigan; he testified that the prisoner called at his residence with Mrs. W., February 26, 1877. The witness was then asked to state what took place between him and them at that time; this was objected to, and the objection overruled. The witness answered, in substance, that he married them, after the prisoner had, under oath, stated that there was no legal objection to his being married:

Held, that the evidence was competent as showing motive, although it tended to prove another crime than that charged in the indictment. (*Id.*)

59. In an action upon a policy of fire insurance, it appeared that when the issuing of the policy was reported to defendant by its agent, it at once notified him to cancel the policy, unless the "average clause" was inserted; this notice did not reach the agent until after the fire. On the trial defendant's counsel asked one of its witnesses whether "an average clause in a policy is favorable or unfavorable to an insurance company." This was objected to and excluded:

Held, no error. (*Standard Oil Co. agt. Amazon Ins. Co.*, 79 N.Y., 506.)

60. Upon trial of indictment for perjury, the testimony of the prisoner, which was alleged to be false, was to the effect that one A. had told him that he had took charge of all of the papers of E. after his decease, and in moving them lost his will: that he had requested A. to make an affidavit of such fact, which he did. The prosecution was allowed to prove, under objection and exception, that the testator in his lifetime burned a paper resembling the will, he declaring at the time that it was his will, and stating its provisions and his reason for destroying it:

Held, no error; that the declarations were competent as part of

the *res gestæ*. (*Elighmy agt. People*, 79 N. Y., 547.)

61. But, *held*, that evidence of declarations of the deceased, made after the alleged destruction of the will, were incompetent. (*Id.*)

62. Also, *held*, that it was competent for the prosecution to show that when A. signed the affidavit sworn to by him he was imposed upon by the prisoner, he substituting it for another A. had heard read, which did not contain the clause in question. (*Id.*)

63. Also, *held*, that the judgment roll in the civil action was competent evidence. (*Id.*)

64. Upon the trial of an indictment for assault and battery, the offense was alleged to have been committed during an affray at a town meeting; one of the witnesses for the prisoner was asked on cross-examination whether he had been indicted for assault and battery, committed on that day; this was objected to, objection overruled, and the witness answered "yes":

Held, that it was a fair inference that the witness was indicted as one of the participants in the affray; and that the question was competent to show the position he occupied, in respect to the controversy out of which the affray arose, and his interest in the litigation, and as showing prejudice or bias. (*Ryan agt. People*, 79 N. Y., 593.)

65. *It seems*, that the mere fact that a witness has been indicted, cannot legitimately tend to discredit him or impeach his moral character, and that evidence thereof is therefore incompetent (FOLGER and EARL, JJ., dissenting, and holding that the allowance of questions on cross-examination of a witness, as to his having been indicted, are in the discretion of the court). (*Id.*)

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66. One of the witnesses for the prosecution, when asked what he saw of the occurrence, answered, among other things, "I should judge he (the complainant) struck a stone;" this was on motion struck out:

Held, no error; as it was not responsive to the question, and was a conjecture, not knowledge. (*Id.*)

67. Also, *held*, that evidence that the prisoner made an effort to keep out of the way of the sheriff was competent. (*Id.*)

68. *It seems*, however, that such evidence is very slight, if any, evidence of guilt. (*Id.*)

69. Where a party was called as a witness by the adverse party, and was examined as to a transaction with a deceased party, in reference to which he would have been precluded from testifying in his own behalf under the Code of Procedure (*sec.* 399):

Held, that the witness was entitled, upon cross-examination, to explain his testimony, and to state the whole transaction. (*Meritt* agt. *Campbell*, 79 N. Y., 625.)

70. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. (*Misland* agt. *Boyn-ton*, 79 N. Y., 630.)

71. Where evidence which is entirely collateral is drawn out on cross-examination, it cannot be contradicted. (*Id.*)

72. The admissions of a witness out of court are not competent evidence to prove his interest in the litigation. (*Id.*)

73. The provision of the Code of Civil Procedure (*sec.* 829), prohibiting a party from testifying, in certain cases, to a personal transaction with a deceased person, does not extend to transactions

with the agents of such person. (*Pratt* agt. *Elkins*, 80 N. Y., 198.)

EXAMINATION OF PARTIES BEFORE TRIAL.

1. In an action for damages for personal injuries a defendant may examine a plaintiff before answer if it appear that the facts stated in the affidavit, upon which the application is based, would tend to support a defense. (*Shaw* agt. *Van Rensselaer*, *ante*, 143.)

2. The application will be denied when the affidavit upon which it is based fails to specify the special matters of defense he wishes to examine the plaintiff upon. (*Id.*)

3. It was a well settled rule that the complainant in a bill of discovery must show a good cause of action or a good defense. This is still an indispensable requisite of an application for the examination of an adversary. (*McCoon* agt. *White*, *ante*, 149.)

4. Whilst there is no reason for introducing the unwarranted and unwarrantable rule that a party who seeks to examine his adversary before trial must swear that he intends to introduce the examination as evidence on the trial, it is eminently proper to adhere to the equity practice which required the party seeking a discovery to state that he expected to prove by the examination the facts which he alleges to lie peculiarly within the knowledge of the person whom he seeks to examine. (*Id.*)

5. In an action on a promissory note where the defendant seeks to examine the plaintiff before answer the affidavit is defective, in that it does not state that the defendant expects to prove that the note in suit was not, either before it matured or at the time of its maturity, in the hands of one who could have collected it from the

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defendant, and that it came after its maturity into the hands of the defendant. (*Id.*)

6. The affidavit is also defective where, admitting everything it alleges, it does not show that the defendant has a defense. (*Id.*)

7. Since the amendment which was made in 1879 to subdivision 6 of section 872 of the Code of Civil Procedure, it is requisite and necessary, in an affidavit on which an application is made for the examination of witnesses where no action is pending, to state what the circumstances are which render it necessary for the protection of the applicant's rights that the witnesses' testimony should be perpetuated. (*Matter of Ketcham's Application*, ante, 154.)

8. The meaning of the amendment to subdivision 6 is to require the applicant to show that he is in danger of losing the evidence of his right before it could be judiciously investigated. To prove that such danger exists it is incumbent on the complainant to allege that he has an interest, present or contingent, in the property, and that the defendant has or claims to have an interest. He is further bound to show that he is in danger of losing his witnesses by sickness, age, death or departure from the jurisdiction, or that his case rested upon the evidence of only one witness. Where he could at once bring a suit, he is bound to show that it has been commenced. If no action is pending, he is obliged to explain why he is not able to maintain an action, the ordinary reasons being that the right of action belonged to the adverse party, or that the adverse party had raised some impediment (an injunction for example) to an immediate trial in a court of law. (*Id.*)

9. Under the provisions of the Code of Civil Procedure, relating to the

examination of parties before trial, the court cannot refuse to grant an order for the examination of a party to an action, actually pending, nor has it any greater or different power to limit the extent of such examination than it has to limit the examination of any witness upon the trial. (*Harrold agt. New York, &c., R. R. Co.*, 21 Hun, 268.)

10. In this action, brought by the plaintiff to recover the price of two hundred and sixty-six bales of rags sold to the defendant, the latter, before answering, made an affidavit stating that the defense was that the sale was fraudulent and void, and that the goods were not what they were falsely and fraudulently represented to be; that in opening some of the bales they were found to contain about one-quarter in weight of substances other than rags, which were of no pecuniary value; that a return of the goods was thereupon tendered to, and refused by the plaintiff; that the plaintiff had thereafter attached the said goods, and that the same were then in the possession of the sheriff, and that the defendant was, therefore, unable to inspect or examine them; that he desired to examine the plaintiff, to prove the contents of the bales not yet opened, and to prove the fraudulent and deceitful packing and arrangement thereof, and to prove the plaintiff's knowledge of and connection with such frauds:

Held, that an order for the examination of the defendant was properly granted. (*Sprague agt. Butterworth*, 22 Hun, 502.)

11. That if, upon the examination, any questions were put to the plaintiff, the answers to which would tend to criminate or degrade him, or to subject him to a penalty or forfeiture, he could then claim his privilege. (*Id.*)

12. Upon an application for an order

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to compel the defendant to appear and be examined before the trial, the existence of a cause of action is not established by allegations in the affidavit, stating simply that the "action is brought to recover damages for certain breaches, on the part of defendant, of a contract in writing." (*Hale* agt. *Rogers*, 22 *Hun*, 19.)

13. Although the affidavit may be made by the attorney, the materiality of the testimony of the witness must be alleged, upon his own knowledge; or, if it be made upon information, the source thereof must be given. (*Id.*)

EXCEPTIONS.

1. In the absence of any motion or act on the part of a defendant, upon the trial of an action from which an assent to a decision of the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. (*First Nat. Bank of Springfield* agt. *Dana*, 79 *N. Y.*, 108.)
2. It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception. (*People ex rel. Dailey* agt. *Livingston*, 79 *N. Y.*, 280.)
3. This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time. (*Standard Oil Co.* agt. *Amazon Ins. Co.*, 79 *N. Y.*, 506.)
4. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. (*Id.*)
5. This rule has not been changed by the provision of the Code of Civil Procedure (*sec.* 999), in reference to the granting of a new trial by the judge presiding at the trial. (*Id.*)
6. For such errors, it seems, the general term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. (*Id.*)
7. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon trial. (*Elghmy* agt. *People*, 79 *N. Y.*, 546.)
8. No exception lies to a refusal to postpone a criminal trial by reason of the absence of witnesses. (*Id.*)
9. Under the provision of the Code of Procedure, in reference to making a case for the purposes of review, in an action tried by the court or a referee (*sec.* 268), the ten days allowed for that purpose did not begin to run until the entry of judgment, and notice thereof; the alternative stated therein, "or within such time as may be prescribed by the rules of the court," meant such further time as might be prescribed. (*French* agt. *Powers*, 80 *N. Y.*, 146.)
10. A service, therefore, of a copy of a referee's report, and notice of filing, did not operate to limit the time to serve a case or exceptions. (*Id.*)
11. The practice, in this respect, was not changed by the provision of the Code of Civil Procedure (*sec.* 994), providing that exceptions, taken after trial, may be

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taken "at any time before the expiration of ten days after service * * * of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon." (*Id.*)

12. While, under this provision, exceptions may be taken at any time after trial they are not required to be taken until ten days after notice of judgment; and although no provision is made as to time for serving the case, as the case is required to contain the exceptions (*Code of Civil Procedure, sec. 997*), it need not, and cannot be served until after the exceptions are framed; and the party cannot be put in default for not serving a case containing them, before the expiration of the time allowed for framing them. (*Id.*)

13. The exceptions referred to in said provision are not simply those taken on the trial. (*Id.*)

14. The attention of the court must be called to the precise point intended by an exception, otherwise it will not avail. (*Schile agt. Brokhahus, 80 N. Y., 615.*)

EXECUTION.

1. In an action to recover damages for a conversion of personal property, the costs exceeded the verdict recovered by the plaintiff, and a judgment for such excess was entered in favor of the defendant:

Held, that as the judgment was recovered in an action for a tort, the plaintiff could be imprisoned under an execution against his person, issued thereon. (*Philbrook agt. Kellogg, 21 Hun, 238.*)

2. Against the person—not rendered void by the omission of a clause requiring the sheriff to return it within sixty days—an order allowing such a clause to be

inserted should be granted as a matter of course—a return made by a sheriff in pursuance of an order, from which an appeal has been taken, should be canceled if the order be reversed on the appeal. (*Benedict Manufacturing Co. agt. Thayer, 21 Hun, 614.*)

3. After certain property of one Paine had been levied upon under an execution, issued upon a judgment recovered against him by one Bagley, and advertised for sale, a question arose as to whether an engine, boiler, and certain machinery so levied upon, were, real or personal property. Thereupon it was agreed by and between Bagley, Paine and the sheriff, that the same should be, and the same were treated and sold as personal property; the judgment creditor buying the same, and also the real estate, relying upon the said agreement. Thereafter, and before the expiration of the time to redeem the real estate so sold, the plaintiff, who had recovered a judgment against Paine after the said sale, redeemed the said real estate from the same, and took a deed thereof from the sheriff. The said boiler and machinery were conveyed to the defendant by a purchaser from Bagley, to whom the same had been voluntarily surrendered by Paine before the recovery of the second judgment. In an action by the plaintiff to recover the said articles, on the ground that they formed part of the realty, *held*, that Bagley having purchased the same in reliance upon the said agreement, Paine was estopped, as against him, from claiming that they were part of the realty. (*Bennett agt. Bagley, 22 Hun, 408.*)

4. That the plaintiff, by redeeming under his subsequently recovered judgment, acquired no greater rights than his debtor had. (*Id.*)

5. The plaintiff claimed that the sale of the personal property was

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void, because it had been sold in bulk, instead of in parcels:

Held, that he could not in this action question the regularity of the sale on that ground. (*Id.*)

6. The plaintiff, having been arrested by virtue of an execution against his person, issued upon a judgment for costs recovered by the defendant herein, moved for and obtained, at special term, an order setting the execution aside unconditionally, which order was, upon appeal, reversed by the general term, but affirmed by the court of appeals. After the granting of the order by the special term, the plaintiff commenced, and is still prosecuting, an action against the defendant for false imprisonment. After the affirmance of the order of the special term by the court of appeals, the defendant moved to have it so modified as to make the relief thereby granted conditional upon the plaintiff stipulating not to bring an action for false imprisonment, or to continue the action already brought therefor:

Held, that the motion was properly denied. (*Catlin* agt. *Adirondack Co.*, 22 *Hun*, 493.)

7. Notwithstanding a levy under an execution upon his personal property, the judgment debtor remains owner; and can convey title, subject to the lien created by the execution. (*Mumpher* agt. *Rushmore*, 79 *N. Y.*, 19.)
8. An assignee for the benefit of creditors, of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud. (*Id.*)
9. Plaintiffs entered into a contract with S. & G., by which the former agreed to malt for the latter 25,000 bushels of barley from October 1, 1875, to June 1, 1876, at a price specified. Plaintiffs were to purchase the barley and ship the

malt when directed by S. & G., who were to have the increase. S. & G. agreed to accept plaintiffs' drafts "in payment for the purchase of the barley," or to furnish satisfactory notes. At the close of each month plaintiffs were to furnish a statement of the amount malted, and on presentation S. & G. agreed to pay the price for malting. S. & G. also agreed to pay interest, exchange and insurance on the barley and malt from the time the barley was paid for by plaintiffs until the malt was delivered. Plaintiffs were authorized to retain and hold as security, after June first, a sufficient amount of the malt to pay any notes or drafts then unpaid. In an action for malt manufactured under the contract, but not delivered or paid for, which had been levied upon by defendant, as sheriff, under and by virtue of an execution against S. & G.:

Held, that the legal title in the malt was in the plaintiffs until paid for, and that S. & G. had no leviable interest therein. (*Truthill* agt. *Bogart*, 79 *N. Y.*, 215.)

EXECUTOR AND ADMINISTRATOR.

1. An action can be maintained by a creditor against an administrator to recover the amount of bonds of the intestate, the payment of which are secured by mortgages executed by him upon real estate, and the fact that the creditor is the owner and holder of mortgages upon lands situated in the state of New Jersey, given as collateral security to the bonds, is no defense to the suit. The provisions of 1 Revised Statutes, 749, section 4, is no bar to such action. (*Thompson* agt. *Sullivan*, ante, 71.)
2. An executor must exercise due diligence in the making of loans to protect himself from personal liability for losses. (*Savage* agt. *Gould et al.*, ante, 217.)

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3. The taking second mortgages and reliance upon the judgment of others not such diligence. (*Id.*)
4. When mortgages so improperly taken are foreclosed and bought in by him for the estate, executor is liable for costs, taxes, &c. (*Id.*)
5. Commissions allowed to a trustee out of trust funds by mortgagees, or to his attorney, when the trustee is to share therein, remain the funds of the estate and are to be accounted for as such. (*Id.*)
6. That some service was rendered by the attorney will not alter this rule when the amount is manifestly excessive, as compensation and the burden is upon the executor to establish such value. (*Id.*)
7. Delegation to others the exercise due from a trustee of his judgment is evidence of incompetency. (*Savage* agt. *Gould et al.*, ante, 234.)
8. So is the investing of trust funds on second mortgages and conversion of good securities for reinvestment. (*Id.*)
9. Surrogates finding that the taking of commissions on loans made by a trustee or by his partner for him, is evidence of dishonesty warranting a removal, approved. (*Id.*)
10. *Emerson* agt. *Bowers* (4 N. Y., 449) distinguished. (*Id.*)
11. Surrogate may remove testamentary trustees (*Contra: Blake* agt. *Sands*, 3 Redf., 168). (*Id.*)
12. Chapter 79, Laws 1873, giving surrogates power to remove executors for dishonesty construed, with chapter 482 of 1871, as giving similar jurisdiction over testamentary trustees. (*Id.*)
13. The plaintiff of surviving executor of George J. Price, sues defendant individually, and as sole acting executor of his father (who with plaintiff was co-executor of said Price), for an accounting and damages and other relief, alleging that defendant's testator, who, as such co-executor, took the exclusive control and management of Price's estate, committed various wrongful acts, set forth, in relation thereto, imperiling it; charging misconduct in relation to said estate on the part of defendant since the death of his father, the books and vouchers in relation to said estate having then come into his possession; and setting up that the widow and children of plaintiff's testator, to whom said testator devised the income of his estate during his children's minority, the principal to be then paid to them, are still living and of full age:
Held, overruling demurrer to the complaint, that an executor not only has the right to call his co-executor to account in a suit in equity, but a foreign executor may be held amenable to like authority to prevent either a complete or partial failure of justice, and to maintain and enforce a trust; defendant being accountable for his testator's misconduct to the extent of the latter's assets in his hands. (*Price* agt. *Brown*, ante, 511.)
14. The complaint states a sufficient cause of action under section 484 of the Code. (*Id.*)
15. The case not being one for a final accounting, the widow and devisees of Price are not necessary parties, and if necessary they may be brought in. (*Id.*)
16. As the causes of action stated in the complaint all arise out of one transaction—the alleged breach of trust of defendant's testator—they have not been improperly united. (*Id.*)

See STREET OPENINGS.

Matter of Opening Sixty-seventh Street, ante, 264.

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*See COSTS.**Murphy* agt. *Travers*, ante, 301.

17. An administrator may avail himself of the defense of the statute of limitations upon the hearing of a disputed claim before a referee, without having pleaded it. (*Converse* agt. *Miner*, 21 *Hun*, 387.)

18. The rendering of an account to a surrogate by an executor or administrator, and the settlement of the account after it has been rendered, are separate and distinct proceedings. (*Remington* agt. *Walker*, 21 *Hun*, 322.)

FEES.

*See SHERIFF.**Little et al.* agt. *Coyle et al.*, ante, 76.

1. Under section 96 of chapter 335 of 1873—providing that no officer of the city of New York should have or receive to his own use any fees, perquisites or commissions, or any percentages, but that every such officer should be paid a fixed salary, and that all the fees, percentages and commissions received by him should be the property of the city—it is no defense to an action brought to compel one of the city officers to account for the fees received by him, that no salary has ever been fixed or attached to his office. (*Mayor, &c.*, agt. *Kent*, 21 *Hun*, 483.)

FINDINGS OF LAW AND FACT.

1. In a case tried by the court, a finding of fact, without evidence to support it, if excepted to, presents a question of law subject to review in this court. (*Sickles* agt. *Flanagan*, 79 *N. Y.*, 224.)

2. To reverse the conclusions of law of a referee, it must appear from the facts found that they are erro-

neous. (*Collender* agt. *Phelan*, 79 *N. Y.*, 366.)

3. To sustain an exception to the refusal of a referee to find facts as requested, it is incumbent upon the party to show that the material facts so requested to be found were established by uncontroverted evidence, and that if found they would have affected the result. (*Stewart* agt. *Morss*, 79 *N. Y.*, 629.)

4. No question can be raised in this court upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. (*Id.*)

FORCIBLE ENTRY AND
DETAINER.

1. In proceedings for forcible entry and detainer under title 2 of chapter 17 of the Code of Civil Procedure, the main question for determination is whether the party charged entered by force upon one, having previously a peaceable possession, under claim of right, and whether the person whose possession was invaded has been held out by force. (*Kelly* agt. *Sheehy et al.*, ante, 439.)

2. These provisions do not cast upon the magistrate the burden of examining and determining conflicting titles to real estate. (*Id.*)

FOREIGN CORPORATION.

1. Where plaintiffs, residents of this state, have a cause of action against defendants, a foreign corporation, arising upon the sale and delivery of personal property made by their brokers, a service upon the president of such corporation while passing through this state was sufficient to commence a suit, although his presence here had no relation whatever to the corporation or to his official

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duties, irrespective of the question whether or not the corporation has property within the state, or whether the cause of action arose therein. (*Pope* agt. *Terre Haute Car Manufacturing Co.*, ante, 419.)

GENERAL TERM.

1. This appeal was taken from a judgment dismissing the complaint in this action, which was brought to have certain railroad bonds, issued by the town of Greenwood, canceled on the ground that an act (ch. 638 of 1874), which undertook to cure certain irregularities in the petition for their issue, was invalid. Upon the hearing of the appeal, it appeared that the validity of the bonds, and of the act in question, had already been passed upon by the general term of the fourth department, upon an appeal from an order, made in this action, continuing a temporary injunction granted therein, and that the judgment below conformed to this decision:

Held, that the former decision of the general term should be accepted as final and conclusive. (*Rogers* agt. *Rochester, &c.*, *R. R. Co.*, 21 *Hun*, 44.)

2. Under the Code of Civil Procedure (sec. 1338), where an order of general term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only. (*Weyer* agt. *Beach*, 79 *N. Y.*, 409.)
3. A general term of the supreme court has power to amend its record, after an appeal to this court, by inserting in an order of reversal that its decision was made upon questions of fact. (*Guernsey* agt. *Miller*, 80 *N. Y.*, 181.)

HABEAS CORPUS.

1. In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An inquiry as to the father's ill-treatment of his wife is pertinent as bearing upon the father's right to take the children from their mother. (*In the Matter of Pray*, ante, 194.)
2. One Lampert, while returning home, after attending at the marine court, in a proceeding to which he was a party, was arrested upon an execution against his person, issued upon a judgment recovered against him in that court, by one Faendler. After he had given bail for the limits, and been discharged from custody, a writ of *habeas corpus* was issued to the sheriff commanding him to bring Lampert before one of the justices of the supreme court, to which the sheriff made a return that he was unable to obey the writ, for the reason that Lampert was not in his actual custody. Upon the hearing, at which Lampert voluntarily appeared, an order was made directing that Lampert be released from the execution, and discharged from all imprisonment in pursuance thereof:

Held, that Lampert was not at the time of the issuing of the writ, imprisoned by the sheriff, nor was his bond for the limits such a restraint by that officer as authorized a resort to the writ of *habeas corpus*.

That the writ could not be issued to inquire into a mere matter of temporary privilege by which the applicant was exempted from arrest, but that his remedy for a violation of such privilege was by an *ex parte* application to the court, before which he was attending, or to the court out of

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which the process had issued.
(*Matter of Lampert*, 21 Hun, 154.)

HUSBAND AND WIFE.

1. Under section 2 of chapter 782 of the Laws of 1876 a wife is not a competent witness *against* her husband, and cannot be called against him by the people without his consent. (*The People* agt. *Briggs*, ante, 17.)
2. In a contest between husband and wife for the custody of their two children, aged five and six years, where there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. An inquiry as to the father's ill-treatment of his wife is pertinent as bearing upon the father's right to take the children from their mother. (*In the Matter of Pray*, ante, 194.)

INDICTMENT.

1. Where the defendant in an indictment moves to quash the indictment for irregularity, a grand juror may be examined and testify to facts showing the irregularity, if it do not arise out of misconduct by the grand jury. (*The People* agt. *Briggs*, ante, 17.)
2. If an indictment be improperly and irregularly found the defendant may, before plea, move upon affidavit to quash it for such irregularity. (*Id.*)
3. The moving affidavit may allege the facts constituting the alleged irregularity upon information and belief, if they should be within the knowledge of the district attorney; and if so alleged they may be sufficient to call upon him to dispute them if not correctly set forth in the moving affidavit. (*Id.*)
4. If an indictment be found or based

wholly, or in part, upon evidence clearly incompetent and illegal it will be quashed and the defendant remanded, that his case may be passed upon by another grand jury upon competent and proper evidence. (*Id.*)

5. The objection that an indictment has no caption, or that it does not show in what court it was presented or found, cannot be raised after a conviction by a motion in arrest of judgment. (*Gray* agt. *People*, 21 Hun, 140.)
6. An indictment for stealing a satchel containing trade dollars, describing them as "sixty silver coins (of the kind usually known as dollars) of the value of one dollar each" is sufficient. (*Miller* agt. *People*, 21 Hun, 443.)
7. The supreme court may, upon application of the prosecution, issue a writ of *certiorari* to remove an indictment into that court from the oyer and terminer. (*Jones* agt. *The People*, 79 N. Y., 45.)
8. As to whether a *certiorari* may be brought for that purpose without the assent and in spite of the authority of the supreme court, *quære*. (*Id.*)
9. It is not necessary to give notice of application for the writ. (*Id.*)
10. It is discretionary with the supreme court after having obtained jurisdiction of the case either to quash the writ upon cause shown, to remand the case to the oyer and terminer, or to proceed to its disposition as in other cases pending before it. (*Id.*)
11. An indictment charged perjury in evidence given by the accused on the trial of a civil action before a referee; the indictment did not allege, in terms, the commencement and pendency of the civil action; it charged that a referee was duly appointed in an action

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then pending in the supreme court of this state, naming the parties:

Held, that this was a sufficient averment to show that the court had jurisdiction of the parties. (*Highmy* agt. *People*, 79 N.Y., 547.)

12. The indictment charged that the referee was "duly and legally appointed in the action" by a justice of said court, "by an order duly made * * * in said action at the chambers of said justice;" also, that the referee was "duly authorized and qualified to perform the duties of that office." It was objected that the indictment was defective, as it did not state that the order of reference was made by the court, but set up an *ex parte* chamber order:

Held, untenable; that it was to be presumed the justice acted in accordance with law, and as he had a right to hold special term at his chambers, and as the appointment was alleged to have been lawfully made, the legitimate inference was that the order was made at special term. (*Id.*)

13. It is not necessary, in an indictment charging perjury committed before a court of general jurisdiction, to set out all the facts showing jurisdiction; an averment that the court had sufficient and competent authority to administer the oath will suffice. (*Id.*)

14. Also, *held*, that proof of the entry of the order of reference was not required, the granting of the order gave the referee jurisdiction. (*Id.*)

INJUNCTION.

See TRADES UNION.

Johnston Harvester Company agt. *Meinhardt*, ante, 168.

INSURANCE COMPANY (LIFE).

1. Where on a motion on the part of the receiver of an insolvent insurance company to confirm the

actuary's report upon the condition of such company, it is objected that the act of 1869, under which the order appointing the receiver was made is no longer in force, but was repealed or suspended by chapter 161 of the Laws of 1879:

Held, that the act of 1869, which provides for the deposit of securities with the superintendent of insurance for the benefit of registered policies and for their oversight and supervision is in no wise changed, altered or affected by the act of 1879. (*The People* agt. *Globe Mutual Life Insurance Company*, ante, 57.)

2. It is further objected that the order appointing the receiver was unauthorized, because preliminary to the action being taken by the attorney-general, there was no report to that officer by the superintendent of insurance that the defendant was "in such a condition as to render the issuing of additional policies and annuity bonds by said company, injurious to the public interests:"

Held, that the manner of the making of such a report, whether it should be oral or written, is not prescribed, nor is it made necessary by the act, that the fact that such a report had been made should be stated to the court. There would seem to be no good reason to require it to be so stated, for after the proceeding is brought the court must satisfy itself "by the allegations and proofs of the respective parties * * * that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter," before it can "issue an order enjoining and restraining the said company from further prosecution of its business, and * * * appoint a receiver of all the assets and credits of said company."

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Held, second, that conceding the necessity of a report from the superintendent of insurance, the statute was in substance complied with. The only possible object of this provision in regard to the action by the superintendent of insurance was that the judgment of that officer should concur in the need of the proceeding, and if he does so concur, there would seem to be no good reason to require it in advance of action by the attorney-general, and that, therefore, the report made before the order appointing a receiver was sufficient.

Held, third, that this and every other objection should have been made upon the application, or at least to the order when it was resettled and re-entered. Instead of objecting the defendant expressly consented and affirmatively asked that the order which was made should be made, and upon its resettlement all its provisions were made to conform to the criticisms and wishes of the defendant. Under such circumstances it cannot now object to the validity of the order, for both statute and constitutional rights may be waived by a party and by a corporation, when it is a party, as well as by a natural person. (*Id.*)

3. It is also objected that the actuary's report should be sent back because such actuary has not taken into account in making his report the future premiums to be received by the company upon its policies, as required by section 8 of the act of 1869:

Held, first, that while the report does not show a detailed valuation of such future premiums, it does not appear that they were not considered in reaching the conclusion of insolvency, for such report does most clearly exhibit all the resources of the defendant and all its liabilities, and states that the latter are in excess of the former \$559,271, and that

"it is clearly impossible for the company to resume business." With such a result before him and the court, any detailed calculations of future premiums became unnecessary to enable either to decide that the company's assets could not meet its obligations as they matured.

Held, second, that prior to the amendment of the act of 1869, by the act of May 5, 1880, all the special term could then do was to send the report back to the actuary for correction; the statute gave the court no power to reject it. While it is true that the act of 1869, as amended by that of May 5, 1880, now requires the actuary's report to be confirmed by the court, whether the same is favorable or unfavorable as to the solvency of the company, yet the propriety of rejecting the actuary's report and thus practically keeping the company in life through a receiver must be considered.

Held, also, that the opinion of the general term in *People agt. Atlantic Mutual Life Insurance Company* (15 Hun, 84), and of the court of appeals in same case (77 N. Y., 336), are directly applicable, and that the report of the actuary should be confirmed and an order entered directing the conversion of the defendant's assets into money pursuant to section 8 of chapter 902 of the Laws of 1869, as amended by section 1 of the act of May 5, 1880. (*Id.*)

4. A life insurance corporation which is bound by law to hold its property and funds for the benefit of the insured, when it, by the deliberate and fraudulent action of its officers and trustees, has wasted and misappropriated its entire capital, and several thousand dollars in addition of moneys received from policyholders, it has, then, offended against not only some, but against all "the provisions of the act or acts creating * * * such corpora-

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- tion." (*The People* agt. *Globe Mutual Life Insurance Company*, ante, 82.)
5. Section 430 of the Code of Procedure expressly declares it to be the duty of the attorney-general, "on leave granted by the supreme court or a judge thereof," to bring an action "for the purpose of vacating the charter, or annulling the existence of a corporation, other than a municipal," which has thus conducted itself. (*Id.*)
 6. The power conferred, and duty imposed, upon the attorney-general by this section of the Code of Procedure has not been in any wise impaired or affected by the act of 1853, or any other statute. (*Id.*)
 7. Where, in pursuance of the provisions of this section, the attorney-general commenced this action in the supreme court by the service of a summons and complaint upon the defendant, for the purpose of enjoining further business by it as a life insurance company and to distribute its assets, and upon an order to show cause, the defendant appearing by its counsel, an application for the appointment of a receiver was heard; the court hearing the allegations and proofs of the respective parties, and the result of the application being an order made by the court appointing a receiver of the defendant. The counsel for the defendant not only took no objection to the form or manner of procedure, but formally united with the attorney-general in the application and strenuously argued and urged the need of prompt action by the court, as asked for by that state official.
Held, that this appearance in the action and consent to the order waived all irregularities, if any existed, and foreclose the defendant from all objections, constitutional or otherwise. An artificial being, as a natural one, when summoned before a tribunal having, by the law of the land, jurisdiction of the subject-matter of the relief asked, and which by the service of process has also obtained jurisdiction of its person, must object at the proper time or be foreclosed from making any. (*Id.*)
 8. The objections made to the constitutionality of the act of 1869 considered and *held* to be untenable:
Held, also, that the order appointing the receiver is valid under the act of 1869. (*Id.*)
 9. The order entered having been held to be valid is irrevocable by consent of the attorneys for the parties. When individuals have voluntarily placed their property in the hands of a receiver made by the court, by no consent of their's can he be removed and the trust abrogated. The court has assumed a duty which is beyond their control. This doctrine is especially applicable to a proceeding against a life insurance corporation, because the course of procedure is all defined by statute. (*Id.*)
- ### INTEREST.
1. Upon a contract for the payment of a sum certain on which interest at seven per cent was lawfully payable prior to January 1, 1880, by the terms of the contract, the rate agreed upon continues as part of the unimpaired obligation of the contract until judgment, notwithstanding the change in the statute and though the contract matured before such change. (*Association for the Relief of Aged and Indigent Females* agt. *Eagleson*, ante, 9.)
 2. In an action for work and labor done and materials furnished where the facts as proved were that no time was fixed under the agreement with plaintiff when the

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job was to be completed—that the job was completed and accepted by the defendant September 9, 1874:

Held, that the bringing of suit was sufficient demand and plaintiffs were entitled to interest from that time at least. (*Case* agt. *Osborn*, ante, 187.)

3. On the above facts found was any demand necessary to entitle the plaintiffs to interest on the amount of the recovery from the time the job was completed and accepted by defendant? *Quære*. (*Id.*)

INTERPLEADER.

1. The provision of the Code of Civil Procedure (*sec.* 820) for interpleader by order is a substitute for the old action of interpleader, and is governed by the same principles. It appeals to the equitable discretion of the court. (*Pustet et al.* agt. *Flannelly*, ante, 67.)
2. Such an application ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity. (*Id.*)

JOINDER.

1. A joint action will not lie against three successive county treasurers to recover damages for alleged misinvestment and mismanagement of trust funds. (*Firth et al.* agt. *Roe*, ante, 432.)
2. They are not co-trustees. Each is a trustee successively, and has no control over the other, and is liable for his own acts only. There could be no contribution between them. (*Id.*)
3. A cause of action for damages for malicious trespass by the original defendants for the erection and continuance of brick stacks,

and another for the removal of these stacks and for injunction against their maintenance and continuance, are improperly joined as against the successors in interest of the original defendant's, who are made parties by a supplemental complaint reviving the action. (*Equitable Life Assurance Society* agt. *Schermerhorn*, ante, 477.)

4. As the newly made parties cannot be charged in tort, the two causes of action do not affect all the parties to the action, as required by section 484 of the Code. (*Id.*)

See EXECUTORS AND ADMINISTRATORS.

Price agt. *Brown*, ante, 411.

JOINT AND SEVERAL LIABILITY.

1. Where in an action for damages alleged to arise from the breach of a written contract to do advertising, a joint liability is charged against numerous defendants, among whom are C., A. and C., copartners, and the latter defendants answer jointly, admitting that they had dealings with and did advertising for plaintiff, but aver that all such dealings were several as to them and not joint with the other defendants, and thereupon such copartners set up counter-claims in their answer, to which counter-claims plaintiff demurs on the ground that all the defendants in this action are sued on a joint liability, that the said counter-claims are alleged in favor of said defendants separately, and that as between the said defendants and the plaintiff a separate judgment in this action cannot be had:

Held, that a demurrer to such an answer is ill, and that defendants are entitled to judgment for the amount due under their counter-claims.

Held, also, that plaintiff's posi-

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tion would have been well taken under the former common law rule; but that the Code of Procedure has radically changed the former rule, and that now under the new Code, section 1204, judgment may be given for or against one or more defendants; that the ultimate rights of parties on the same side, as between themselves, may be determined, and a defendant granted any affirmative relief to which he is entitled. (*Clegg* agt. *American Newspaper Union*, ante, 498.)

JUDGMENT.

1. This action was commenced in November, 1869, to foreclose a mortgage, the plaintiff praying for a judgment for any deficiency that might arise upon a sale, against the defendant Griswold, the mortgagor, and against the defendant Coe, upon an independent guaranty executed by him. Coe died on January 9, 1870. On January 20, the court directed the usual judgment of foreclosure and sale to be entered as of January 6, 1870, *nunc pro tunc*. This judgment contained no provision charging the defendant Coe with any deficiency.

Upon a sale, had in 1877, a large deficiency arose, the premises being purchased by one Wm. H. Grant, who was, upon the death of the original plaintiff, in 1878, appointed his executor. Thereafter, and on December 24, 1879, he, as such executor, moved to amend the said judgment, *nunc pro tunc*, as of January 6, 1870, by inserting therein a provision charging the said Coe with any deficiency that might arise upon the sale:

Held, that the court had no power to grant the motion, as the application, though in form one for leave to amend the judgment, was in reality one for leave to enter an original judgment by default, against Coe, some ten

years after his death. (*Grant* agt. *Griswold*, 21 *Hun*, 509.)

2. That even if the court had power to make the order, it erred in exercising it in this case as no excuse was given for the long delay in making the application. (*Id.*)
3. What must be shown to authorize entry of judgment by default, in a case where summons has been served by publication—Code Civil Procedure, §§ 435, 1217. (*See Clark* agt. *Boreel*, 21 *Hun*, 594.)
4. For divorce—who cannot attack it for fraud or collusion on the part of the parties procuring it. (*See Ruger* agt. *Heckel*, 21 *Hun*, 489.)
5. Power of a court to vacate. (*See Underwood* agt. *Sutcliffe*, 21 *Hun*, 357.)
6. A judgment of the United States circuit court, though docketed in a county clerk's office, still remains a judgment of that court, and an action can be brought thereon without first obtaining leave from the court so to do, as is required by section 71 of the Code when an action is to be brought upon a judgment recovered in a court of this state. (*Goodyear Dental Vulcanite Co.* agt. *Frisselle*, 22 *Hun*, 174.)
7. Where in a proceeding under the general lien law (*chap. 402, Laws of 1854, as amended by chap. 558, Laws of 1869, and chap. 489, Laws of 1873*), to foreclose an alleged mechanic's lien, it appears that no lien ever existed, a personal judgment cannot be rendered against the owner of the premises upon an independent contract between him and the claimant. (*Weyer* agt. *Beach*, 79 *N. Y.*, 409.)
8. The proceeding being statutory, can only be resorted to in a case falling within the statute, *i. e.*, where a mechanic's lien exists.

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The power to render a personal judgment is merely incidental to the main purpose, and where it appears that no lien ever existed, the whole proceeding falls. (*Id.*)

9. As to whether, under said act, any personal judgment can be rendered except for a deficiency, *quære*. (*Id.*)

10. In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay the plaintiffs a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular:

Held, that it was not authorized by the judgment, and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets. (*Geery* agt. *Geery*, 79 N. Y., 565.)

11. To justify an appellate court in rendering final judgment against the respondent upon reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial; it must appear that he certainly cannot. (*Guernsey* agt. *Miller*, 80 N. Y., 181.)

12. Under the provisions of the Code

of Civil Procedure (*secs.* 191, 194), requiring a party, on appeal from an order granting a new trial, to stipulate for judgment against him in case of affirmance, and directing this court, in such case, to render judgment absolute upon the right of the appellants; also authorizing such proceedings in the court below upon the remittitur as are necessary to render the judgment effectual, the judgment must be absolute against the appellant upon the whole matter and right in controversy in the action. (*Hiscock* agt. *Harris*, 80 N. Y., 402.)

13. Where, therefore, an order, reversing a judgment in favor of plaintiff and granting a new trial, is affirmed on appeal to this court, and judgment absolute ordered, in an action wherein the answer sets up a counter-claim, defendant is entitled to such judgment upon the remittitur as the facts alleged by him in his answer entitle him to. (*Id.*)

JURISDICTION.

1. The law is well settled in this country that courts of justice in one state will, out of comity, enforce the laws of another state or country when, by such enforcement, they will not violate their own laws or inflict injury upon some one of their own citizens. (*Roblin* agt. *Long*, *ante*, 200.)

2. This court having acquired jurisdiction of the person of the defendant, it possesses full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint, though the same are situated in the Province of Canada and without the jurisdiction of this court. (*Id.*)

3. Supreme court has no jurisdiction of an action to construe a

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- will, containing no trusts. (*See Wager* agt. *Wager*, 21 *Hun*, 93.)
4. The jurisdiction and power of the courts was not affected by the provision of the Code of Procedure (*sec.* 428), abolishing the writ of *quo warranto* and proceedings by information in the nature thereof; it is only the form of the proceedings that was done away with. The remedies theretofore had in those forms may now be obtained by civil action. (*People ex rel.* agt. *Hall*, 80 *N. Y.*, 117.)
 5. As to whether the jurisdiction of the courts in those matters can be affected by legislation, *quære*. (*Id.*)
 6. The provision of the charter of the city of New York of 1873 (*sec.* 6, *chap.* 335, *Laws* of 1873), making the board of aldermen "the judge of the election, returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction," did not oust the courts of jurisdiction, or prevent them from originating an inquiry as to the right to that office (*CHURCH, Ch. J., dissenting*). (*Id.*)
 7. The provision simply creates a cumulative jurisdiction, by the exercise of which the board is for the time constituted a legal body and its acts are made authoritative, leaving to courts of competent jurisdiction the right to inquire in behalf of the people, into the right of any person who, by action of the board, holds a place in it (*CHURCH, Ch. J., dissenting*). (*Id.*)
 8. The distinction between the occasions and the effect of the use of these phrases in a legislative enactment conferring power upon the councils of municipalities or other inferior tribunals, and their use in the Constitution of the United States (*art.* 1, *sec.* 5, *sub.* 1), and of this state (*art.* 3, *sec.* 10), conferring power upon the houses of the legislature pointed out. (*Id.*)
 9. A general term of the supreme court has power to amend its record, after an appeal to this court, by inserting in an order of reversal that its decision was made upon questions of fact. (*Guernsey* agt. *Miller*, 80 *N. Y.*, 181.)
 10. As an action of trespass *quære clausum fregit* is local in its character, it will not lie in this state where the land is located in another state. (*Am. Un. Tel. Co.* agt. *Middleton*, 80 *N. Y.*, 408.)
 11. An order of arrest was issued in an action to recover damages for wrongfully and maliciously cutting down and carrying away certain telegraph poles, with the wires and insulators attached thereto, which were located in a highway in the state of New Jersey, and formed part of a continuous telegraph line in operation in that state. On motion to vacate the order of arrest, *held*, that the order was not properly granted; that as the poles were affixed to the soil they were part of the realty, and the cutting down of the same was a trespass, the damages for which could only be recovered in an action *quære clausum fregit*; that the cutting down and removal charged was one continuous transaction, which constituted but one cause of action, which could not be divided, and which was local; also, that the objection as to jurisdiction could be taken on such a motion; as, if the order of arrest was granted without authority, defendant was entitled to have it vacated, and was not bound to raise the question by answer or demurrer. (*Id.*)
 12. As to whether the lapse of the thirty days limited for service of summons, after the issuing of an attachment, ousts the court of jurisdiction and abates the action or merely avoids the attachment,

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quære. (*Mojarrieta* agt. *Saenz*, 80 N. Y., 547.)

13. A plaintiff after having obtained one attachment and order of publication, may abandon them and take out a new attachment and order, provided this is not done for the purpose of vexation. (*Id.*)

14. It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used which was used in obtaining the first. (*Id.*)

15. *It seems*, that it is proper thus to use the affidavit a second time, but if not it is a mere matter of practice, a departure from which by the court does not deprive it of jurisdiction. (*Id.*)

16. *It seems*, also, that the omission upon the second application to comply with this rule (25) requiring that the affidavit upon an *ex parte* application shall state whether a previous application has been made, does not affect the jurisdiction; it is a mere irregularity, and if not regarded by the court below will not be regarded here. (*Id.*)

17. When jurisdiction of court of another state will be presumed. (*See P. P. G. Co.* agt. *Wheelock*, 80 N. Y., 278.)

18. General term of supreme court has no power to vacate judgment as to costs, which has been affirmed by this court, at least when no new facts are presented. (*See Sheridan* agt. *Andrews* [Mem.], 80 N. Y., 648.)

JUROR.

1. In this action, brought by the plaintiff upon a policy of insurance issued by the defendant to her upon the life of her husband, one of the defenses was that the husband had committed suicide,

and thereby avoided the policy. When the case was brought on for trial, several of the jurors stated, on being examined by the defendant's counsel, that they should consider the fact that a man had committed suicide as some evidence of insanity; some stating that they should so consider it in some cases, and all stating that they should require other and additional evidence to establish it:

Held, that the jurors were competent, and that a challenge interposed by the defendant's counsel was properly overruled. (*Hagedorn* agt. *Conn. Mut. Life Ins. Co.*, 22 Hun, 247.)

JUSTICE OF SUPREME COURT.

1. Cannot act as referee — Constitution, article 6, section 25. (*See Countryman* agt. *Norton*, 21 Hun, 17.)

LIEN.

1. *Seem*, that under section 66 of the Code of Civil Procedure, as amended in 1879, the attorney for a defendant, in whose favor a judgment for costs has been entered upon the dismissal of the complaint, acquires a lien thereon for his compensation, which is superior to the right of the plaintiff to set off a prior judgment in his favor, whether he seek to enforce such right upon a motion or by an action. (*Ennis* agt. *Curry*, 22 Hun, 584.)

See ATTORNEY.

McCabe agt. *Fogg*, ante, 488.)

MANDAMUS.

1. In what cases the writ should not issue. (*See People ex rel. Coppers* agt. *Trustees*, 21 Hun, 184.)

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MARRIED WOMAN.

1. Where the complaint alleged that the defendants executed a bond to the plaintiff for \$7,500, guaranteeing the payment of all indebtedness that might be incurred by one H. L. Wilcox to the plaintiff, and that defendant F. in said bond expressly charged her separate estate with the payment; then set out breaches of the bond and demanded judgment. F., the defendant, set up by answer "that at the time of the making of said bond she was, and still is, a married woman, and has had no separate estate and has carried on no separate trade or business."

Held, that the complaint should be dismissed as to defendant F. If she had no separate estate at the time of the execution of the bond, she was not competent to enter into the contract which the bond contains. (*Wilson Sewing Machine Company* agt. *Fuller*, ante, 480.)

2. A married woman cannot give herself a legal capacity to contract by falsely representing that she has such capacity. (*Id.*)
3. In an action to foreclose a mortgage upon real property, the wife of the owner of the equity of redemption may, under section 450 of the Code of Civil Procedure, appear and defend, by her own attorney, as though she were single. (*Jankinski* agt. *Heidelberg*, 21 *Hun*, 439.)

MARRIAGE.

1. In 1875, judgment of divorce was obtained in this court against the defendant by his wife Ellen for his adultery, and by the terms of the judgment the defendant was prohibited from marrying again until Ellen should be actually dead. (*Kerrison* agt. *Kerrison*, ante, 51.)
2. In 1875, Ellen being still living, the parties to this action, for the

purpose of evading the prohibition contained in such decree, went to the state of New Jersey and were there married, intending to and in fact returning soon thereafter to this state, where the defendant was at the time a domiciled resident, and where the plaintiff also resided. At the time this action (which was brought to declare the marriage void) was begun, the defendant was, and now is, a British subject and a resident of Canada, the summons being served by publication. The defendant appears and answers, but in his answer denies the jurisdiction of the court in the premises:

Held, that it is an open question whether legislation upon the subject since the adjudications holding such marriage to be void, has given such a legislative interpretation to the old statute, that a prohibition against a subsequent marriage was intended only as a punishment of the offending party.

Held, also, that if the marriage of the parties was illegal, the plaintiff is not in position to ask to be relieved from its bond. The facts as stated, being fully borne out by the proofs, render it extremely improper for the courts to afford the plaintiff any relief. The law does not interfere between those who are equally in the wrong. (*Id.*)

3. The case of *Marshall* agt. *Marshall* (2 *Hun*, 238) criticised and not followed. (*Id.*)
4. The right of a defendant in a divorce suit, the judgment in which prohibited him from marrying again, to make application under section 49 of the Laws of 1879, for a modification of such judgment, is saved by the repealing act of 1880; and section 1761 of the Code of Civil Procedure, containing the disqualification upon re-marriage never became operative law, except as modified by said repealing act. (*Peck* agt. *Peck*, ante, 206.)

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5. Where a person from whom a former wife obtained a decree of divorce in this state, in which decree he was forbidden to marry again during her lifetime, goes to another state for the purpose of evading the law, and there, the first wife being still alive, contracts a second marriage, immediately thereafter returns to this state:

Held, that although it be true that such marriage is to be judged by the *lex loci contractus*, the preliminary question of the capability of the party to contract a second marriage is presented when such party appeals to a tribunal of this state, and that capability is to be determined by the law, not of Pennsylvania but of New York; and as by the laws of the latter state he was absolutely forbidden to contract it, such second marriage was void (*see Kerrison* agt. *Kerrison*, ante, 21). (*Thorp* agt. *Thorp*, ante, 295.)

MARINE COURT.

1. An attendant of the marine court of the city of New York holds an "office" within the meaning of that term, as used in section 3 of chapter 382 of 1870, prohibiting any increase in the salaries "of persons then in office, or their successors." (*Moser* agt. *Mayor*, 21 *Hun*, 163.)
2. Where, upon the trial of an action brought by one claiming to have been appointed an attendant upon the marine court, under a particular act, to recover the salary attached to such office, his attention is specifically called to the fact that he has failed to prove an appointment thereunder, he cannot, upon the hearing of an appeal taken by the defendant, from a judgment rendered against it, introduce documentary evidence to prove that in fact he was appointed thereunder. (*Id.*)

3. Appeal from an order of, granting a new trial, to the common pleas—the stipulation required by chapter 545 of 1874 must be given upon it—power of the appellate court when the stipulation is not given. (*See People ex rel. Salke* agt. *Talcott*, 21 *Hun*, 591.)

4. The provision of the act of 1874, in reference to the marine court of the city of New York (*sec. 9, chap. 545, Laws of 1874*), which requires that a notice of appeal from an order of the general term of said marine court to the court of common pleas, reversing a judgment and granting a new trial, shall "contain an assent, on the part of the appellant, that if the order be affirmed, judgment absolute shall be entered against him," etc., was not repealed or abrogated by the provision of the act of 1875 (*chap. 479, Laws of 1875*), in reference to said marine court, which regulates appeals from the general terms thereof. (*Gordon* agt. *Hartman*, 79 *N. Y.*, 221.)

5. Where the common pleas affirms the order appealed from, and gives judgment absolute on the stipulation against the appellant, the judgment is final; and no appeal therefrom lies to this court. (*Id.*)

MASTER AND SERVANT.

1. Damages in an action for wrongful discharge from employment are recoverable up to the time of trial (*Limiting Toles* agt. *Hazen*, 57 *How. Pr.*, 516). (*Everson* agt. *Powers*, ante, 166.)

MORTGAGE.

1. The mortgage in suit, which contains no covenant to pay taxes, was executed by defendant Doellner in 1872. He sold the premises

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in 1873, to defendant Guggenheimer, who assumed payment of the mortgage. In 1874, Guggenheimer sold the property subject to the mortgage. The judgment of foreclosure permitted the purchaser to retain out of the purchase money the amount of all taxes and assessments which, at the time of the sale, were a lien on the premises, and \$578 were deducted to discharge taxes due upon the premises for 1877 and 1878:

Held, that a motion by Guggenheimer to deduct the \$578 from the judgment against him for deficiency, comes too late after sale under the decree; and that at any rate Guggenheimer was liable for the deficiency after deducting such taxes from the purchaser's bid. (*Fleishhauer* agt. *Doellner*, ante, 438.)

See PRINCIPAL AND AGENT.

Rich agt. *Smith et al.*, ante, 13, 157.

MORTGAGE FORECLOSURE.

1. Where, in a foreclosure suit, a motion was made by plaintiff for judgment based upon an affidavit of regularity under Rule 63, where all the parties were in default except an infant who had appeared and interposed an answer:

Held, that as the third defense contained in the answer of the infant by his *guardian ad litem* raises a material issue, namely, the amount unpaid on the mortgage held by the plaintiff, the motion being based solely upon Rule 63, must be denied. (*Jackson* agt. *Reon*, ante, 103.)

See PARTIES.

Hebron Society agt. *Schoen*, ante, 185.

MOTIONS AND ORDERS.

1. The decision of a judge in settling interrogatories to be attached to a commission is an order (*Code*, sec.

767); if it disallows a pertinent question, it affects a substantial right; and is therefore appealable (*Code*, secs. 1347, 1348). (*Uline* agt. *N. Y. C. and H. R. R. Co.*, 79 *N. Y.*, 175.)

2. An appeal does not lie from an order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial (*Code*, sec. 911). (*Id.*)

3. Under the Code of Civil Procedure, (sec. 1338), where an order of general term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only. (*Weyer* agt. *Beach*, 79 *N. Y.*, 409.)

4. An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order. (*Watrous* agt. *Kearney*, 79 *N. Y.*, 496.)

5. It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. (*Id.*)

6. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged in the moving papers that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney who appeared on return of the attachment made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee, to whom it was referred to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report.

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Held, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order. (*Id.*)

7. The provision of the Code of Civil Procedure (*sec.* 1342), in reference to appeals to the supreme court from orders of a county court, confines the appellate jurisdiction to orders in actions originating in the county court. (*Andrews* agt. *Long*, 79 N. Y., 573.)

8. Accordingly, *held*, that an order of county court, dismissing an appeal from a judgment of a justice of the peace, was not appealable to the supreme court. (*Id.*)

9. A supplemental complaint should not be allowed upon an *ex parte* application. (*Fleischmann* agt. *Bennet*, 79 N. Y., 579.)

10. Notwithstanding the mandatory language of the Code of Civil Procedure (*sec.* 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case; such application, therefore, should be upon notice, so that both parties may be heard. (*Id.*)

11. Where an order of special term, vacating an assessment for a local improvement, is reversed by the general term on the ground that the assessment should be reduced, not vacated, and the case is remitted to the special term, that the assessment may be modified in conformity with the principles laid down by the general term, the order of general term is not a final order; and so is not reviewable here. (*In re Pet. Auchmuty*, 79 N. Y., 622.)

12. After plaintiff had been partially examined as a witness on trial before a referee, the hearing was adjourned, and was set down for

two successive days. The referee upon the first day informed the attorney for the parties that the case would not be proceeded with that day, but would be the next. He was advised by defendant's attorney that he could not attend the next day; he did not appear, and the case was proceeded with on the second day. Several witnesses being examined for plaintiff without any one appearing for defendant. A motion was made on behalf of defendants at special term to strike out the evidence so given, which was denied. A similar motion was thereafter made before the referee upon a subsequent hearing:

Held, that the motion was properly denied. (*Comins* agt. *Hetfield*, 80 N. Y., 261.)

13. Also, *held*, that the claim of a mistrial because of the proceeding of the referee without an adjournment was a question of irregularity disposed of on the motion, and not reviewable on appeal from the judgment. (*Id.*)

14. Also, *held*, that an order of special term denying a motion to set aside the referee's report and the judgment thereon, and to vacate the order of reference because of irregularity in the proceedings before the referee, was not reviewable here; that it was a matter addressed to the discretion of that court. (*Id.*)

15. Where feigned issues in an action are tried by a jury, and the judge presiding at the trial neither entertains a motion for a new trial nor directs exceptions taken at the trial to be heard at the general term, a motion for a new trial can only be made under the Code of Civil Procedure (*sec.* 1003) at the special term, where the motion for final judgment is made, and before such judgment. (*Chapin* agt. *Thompson*, 80 N. Y., 275.)

16. The provision of said Code (*sec.*

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1005) providing for a motion for a new trial after judgment, has reference to a new trial of the action itself, not to a new trial upon the feigned issues which may have been awarded therein. (*Id.*)

NEGLIGENCE.

1. A parent is not liable for the trespasses or negligence of an infant child. (*Schlossberg* agt. *Lahr*, ante, 450.)

NEW TRIAL.

1. A motion for a new trial on the ground of surprise cannot be made upon the minutes of the justice before whom the action was tried. (*Argall* agt. *Jacobs*, 21 *Hun*, 114.)
2. Appeal to the common pleas from an order of the marine court granting a new trial—the stipulation required by chapter 545 of 1874, must be given upon it—power of the appellate court when the stipulation is not given. (*See People ex rel. Salke* agt. *Talcott*, 21 *Hun*, 591.)
3. Code of Civil Procedure, section 999—upon what grounds a motion for a new trial on the minutes of the judge may be made. (*See Robson* agt. *New York Central, &c., R. R. Co.*, 21 *Hun*, 387.)
4. An application for a new trial, under the statute, in an action of ejectment, was made on behalf of defendant and one L., who claimed to have derived his interest from B., who, it was alleged, was the landlord under whom defendant was in possession. The right of L. was expressly controverted by the opposing affidavits, and it was also shown that when the action was ready for trial defendant withdrew his answer, and judgment was entered by his consent in open court. The application was made by an attorney who
- was not the attorney of record of defendant, and who had not been substituted in place of the original attorney. The application was denied with leave to renew:
Held, that as it was at least very uncertain what were the facts, and whether a case was made out within the statute (2 *R. S.*, 309, secs. 36, 37, as amended by chap. 485, *Laws* of 1862), and as the moving parties had not availed themselves of the permission given to supply the defects, the order should be affirmed. (*Sacia* agt. *O'Connor*, 79 *N. Y.*, 260.)
5. This court can only review judgments and grant new trials for errors of law, and such errors must be pointed out by exceptions taken at a proper time. (*Standard Oil Co.* agt. *Amazon Ins. Co.*, 79 *N. Y.*, 506.)
6. Where, therefore, it is alleged that a verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. (*Id.*)
7. This rule has not been changed by the provision of the Code of Civil Procedure (sec. 999), in reference to the granting of a new trial by the judge presiding at the trial. (*Id.*)
8. For such errors, *it seems*, the general term has power to grant a new trial in its discretion, although no exceptions were taken on the trial. (*Id.*)
9. Where feigned issues in an action are tried by a jury, and the judge presiding at the trial neither entertains a motion for a new trial nor directs exceptions taken at the trial to be heard at the general term, a motion for a new trial can only be made under the Code of Civil Procedure (sec. 1003) at the special term, where the motion for final judgment is made, and be-

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fore such judgment. (*Chapin* agt. *Thompson*, 80 N. Y., 275.)

10. The provision of said Code (*sec.* 1005) providing for a motion for a new trial after judgment, has reference to new trial of the action itself, not to a new trial upon the feigned issues which may have been awarded therein. (*Id.*)

NEW YORK (CITY OF).

1. The return of the respondents, the commissioners of public parks, to the writs of *certiorari*, shows that they discharged the relators, who were clerks in the department of parks, from the public service, because the appropriation for the maintenance of the park department, for the year in which the relators were severally discharged, had been reduced by the board of apportionment below the appropriation for the previous year, which necessitated the reduction of expenses and the removal:

Held, that the terms of chapter 335, section 28, of the laws of 1873, which prohibits the removal of a clerk until he has been informed of the cause of his proposed removal, and an opportunity has been offered him for making an explanation does not apply. That notice and an opportunity to explain applies to cases where the removal is proposed to be made for cause *personal to the party*, or when it is sought arbitrarily and without adequate reason, to substitute another person in the place of one proposed to be removed. (*The People ex rel. Evans* agt. *Board of Commissioners of Public Parks*, *ante*, 130.)

2. The College of the City of New York is a distinct corporation having no dependence on the city. (*The People ex rel. Burnet* agt. *Jackson*, *ante*, 330.)

3. The finance department of the

city is merely the custodian of the funds raised by taxation for the college. (*Id.*)

4. The vouchers of the college trustees are conclusive on the finance department. (*Id.*)
5. *Mandamus* will lie against the comptroller to compel the audit of such vouchers. (*Id.*)

6. The relator, a policeman, having been convicted by the police board upon a charge of receiving sums of money on several occasions from the keepers of a house of prostitution as an inducement for allowing certain privileges, was dismissed from the force:

Held, that under the law of 1873, giving the board power to dismiss any member on his conviction of a legal offense or neglect of duty, or any conduct injurious to the public welfare, or immoral conduct or conduct unbecoming an officer, though the relator could have been convicted and punished for the offense, yet it was not necessary to await a conviction in a court of criminal jurisdiction before instituting the inquiry. (*The People ex rel. Murphy* agt. *French et al.*, *ante*, 377.)

7. There being evidence to uphold the judgment of the board, and no rule of law having been violated, the judgment should not be disturbed. (*Id.*)
8. The effect of the act of 1873, vesting in the judges of the supreme court the power to appoint attendants (*Laws of 1872, chap. 438*) though it took effect immediately, did not so operate as to terminate the existing office, or impair its functions, or remove incumbents; it transferred the power of appointment from one officer to another body of officers; but the omission of the latter to use their authority could not be construed into a removal of the existing offi

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cers, although a new appointment by the judges of another person to the same office would necessarily have that effect. (*Blunt agt. The Mayor, ante, 482.*)

9. The officer *ad interim* would be entitled to compensation if he had rendered the services (*The case of Genet agt. The Mayor, 76 N. Y., 625, not in conflict.*) (*Id.*)

NEW YORK STOCK EXCHANGE.

1. A seat in the New York Stock Exchange is property that may be applied toward satisfaction of a judgment against its owner. Per BEACH, J. (*VAN BRUNT, J., dissenting.*) (*Grocers' Bank agt. Murphy, ante, 426.*)

OFFICE AND OFFICER.

1. At a general election held in and for Sullivan county, the relator and the defendant were the two and only two candidates to be voted for in that county for the office of county judge. The whole number of votes cast was 6,179; of which defendant received 3,211 and the relator received 2,947. The certificate of election was given to the defendant by the board of county canvassers, and on January 1, 1879, he took possession of the office, having first taken the oath required by the Constitution and filed the necessary bond. The term of office was six years, and the salary as fixed by law was \$2,500 per annum. The defendant after he became a candidate for the office, and during the whole canvass, down to the day of election, published and circulated throughout the county a promise addressed to the electors to this effect: "That if elected to the office of county judge I will pledge myself to take only \$1,200 a year for my serv-

ices; that I will pay out of my own pocket the coal necessary to heat my law office; that I will pay for all stationery and letter heads, and will see that persons needing blanks pay for them themselves, and if a member of assembly can be elected who will have the law amended reducing the salary to \$1,200, I will guarantee to waive all constitutional objections and never question its validity."

Held, that this was sufficient to invalidate the defendant's right to the office he now holds. (*People ex. rel. Bush agt. Thornton, ante, 457.*)

2. The promises and pledges of the defendant were made to the taxpayers and electors generally, and were of a character, within the fair spirit and meaning of the acts, impliedly prohibited by article 12, Constitution of this state. (*Id.*)
3. It is not necessary that there should be evidence from any witness who voted at the election for defendant, that he did so in consequence of such pledges and promises. The illegal promises to induce votes having been affirmatively shown to have been made to every elector, more particularly to every taxpaying elector, the *onus* of showing the numbers of votes that were influenced thereby, should devolve upon the defendant, and it should devolve upon him to show the number of votes uninfluenced by such promises he did actually receive. (*Id.*)
4. An offer of a bribe is criminal, and this is so whether the offer is accepted or not. It disfranchises the party making the offer as well as the party influenced thereby.
Held, also, that the relator is not entitled to the office. He did not receive a majority of the votes of the legal electors who at that election cast ballots for the office of county judge, and consequently was not elected. (*Id.*)

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PARENT AND CHILD.

1. A parent is not liable for the trespasses or negligence of an infant child. (*Schlossberg* agt. *Lahr*, ante, 450.)

PARTIES.

1. The mortgagor of mortgaged premises, who died seized thereof, left by will a legacy to his daughter Cecelia, not making it a charge upon the real estate. He left sufficient personal property to pay the legacies, and bequeathed the "remainder," including the real estate, to his sons:

Held, that Cecelia has no interest in the mortgaged premises, and was therefore not a necessary party to this action to foreclose the mortgage.

Held, that the fact that the executors have wasted the personal property, and have neglected to pay the legacy, cannot charge the real estate with such payment. (*Hebron Society* agt. *Schoen*, ante, 185.)

See EXECUTORS.

Price agt. *Brown*, ante, 511.

2. Where one railroad company has leased the road of another, such lessee is a necessary party to a proceeding under the general railroad act, by a third company to acquire the right to cross the leased road; it may voluntarily agree with the petitioner in respect to the crossing, and such agreement, while not binding upon the lessor, in respect to its interests as reversioner, binds the interests of the lessee. (*In re B. H. T. and W. R. R. Co.*, 79 N. Y., 69.)
3. In such case it is not essential that one proceeding shall embrace all the parties; it will only affect the parties brought in, and where the lessee is alone made a party, the estate in reversion will not be affected. (*Id.*)

4. Plaintiff was appointed by said commissioner janitor of the building occupied by the police court of the second district, and by the district or civil court of the third district; the justice of the latter court appointed C. janitor for that court. The board of estimate and apportionment made an appropriation for the salary of one janitor for said building, conditioned, however, substantially, that no portion thereof should be paid by the comptroller to either appointee until the question was judicially determined that he was and that the other was not entitled to be paid:

Held, that the appropriation could only be availed of in an action or submission, to which both claimants were parties, and then only on establishing that the power to appoint janitors was exclusive, either in the court or the commissioner, and that there could be but one janitor; and that, therefore, plaintiff was not entitled to judgment upon a submission of the controversy under the Code of Civil Procedure (sec. 1279), as between him and the city, to which C. was not a party. (*Kennedy* agt. *Mayor, &c.*, 79 N. Y., 361.)

5. Where a party was called as a witness by the adverse party and was examined as to a transaction with a deceased party, in reference to which he would have been precluded from testifying in his own behalf under the Code of Procedure (sec. 399):

Held, that the witness was entitled, upon cross-examination, to explain his testimony, and to state the whole transaction. (*Merritt* agt. *Campbell*, 79 N. Y., 625.)

6. The provision of the Code of Civil Procedure (sec. 829), prohibiting a party from testifying, in certain cases, to a personal transaction with a deceased person, does not extend to the transactions with the agents of such

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person. (*Pratt* agt. *Elkins*, 80 N. Y., 198.)

7. Where two persons, for a consideration sufficient as between themselves, covenant to do some act, which, if done, would incidentally result in the benefit of a mere stranger, he has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other. (*L. O. S. R. R. Co.* agt. *Curtiss*, 80 N. Y., 219.)

8. Defendant and others signed the following instrument: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad to the amount set opposite our name respectively, on condition said road be located and built through or north of the village of Unionville, in Parma." In an action thereon, held, that it was not a subscription to plaintiff's capital stock; that it was in no sense a party to the agreement, and could not maintain an action thereon. (*Id.*)

9. *It seems*, that an action by a party to the instrument could not be maintained in the absence of evidence that the contract was entered into for his benefit, and not until after the condition stated therein had been performed; also, that any recovery would be, not for the amount of the promised subscription, but only for the damages which such party had sustained. (*Id.*)

10. The lessee of one of the defendant's piers, on the Hudson river, drove spiles in front of it, which were fastened to the pier by bolts and chains; two of them became loose, and fell away from the pier, their upper ends projecting into the river; they were wholly submerged, except at low tide. Plaintiff's steam tug, in passing the pier, struck the spiles and was

injured. It did not appear that the city officials had any notice that the spiles had fallen away, or that they in any way obstructed the navigation of the river:

Held, that an action to recover the damages was not maintainable against defendant; that as the city had nothing to do with placing the spiles, or in causing them to fall in the river, it owed no duty in regard to them; also, that even if it did owe any such duty, that duty could not arise until it had some notice. (*Seaman* agt. *Mayor*, 80 N. Y., 239.)

11. Where two or more persons or corporations are operating a railroad, their liability to an employee for an injury resulting from defective machinery furnished by them for use in the course of his employment, is several as well as joint, and an action is maintainable against one of them. (*Kain* agt. *Smith*, 80 N. Y., 458.)

PARTNERSHIPS.

1. The statute (*Laws of 1833, chap. 281*) which provides that "no person shall transact business in the name of a partner not interested in his firm, and when the designation '& Co.' is used, it shall represent an actual partner or partners," is highly penal, and the use of the words "& Co.," when representing the wife of such person, is not a violation of the statute. The name of the wife when so used is a real one and the words "& Co.," when so employed, are in no sense fictitious. (*Zimmerman et al.* agt. *Erhard et al.*, ante, 163.)

2. Where goods are sold on different days, each sale constitutes a separate and distinct cause of action, and the plaintiff may, at his election, bring separate actions for each, or for all of them together. (*Id.*)

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PARTY WALL.

1. Where S., who owned five adjoining new dwelling-houses, represented to M., during negotiations with him for the sale of one of them, that he was restricted from erecting other than first-class private residences on the property, and that they would be, first and last, private residences; and M., relying on these statements, purchased one of the houses as a private residence and permanent home, and then S. enlarged the other houses, not as private residences, but for business purposes, namely, as part of a family hotel:

Held, that though these representations were not incorporated in the deed or in the contract of sale, and were not repeated or alluded to at the time the contract of sale and purchase was made, S. should, in equity, upon M.'s application, be restricted from altering the character of the houses, unless M.'s rights in this respect have been waived. (*Musgrave* agt. *Sherwood*, ante, 339.)

2. The use by S. of the existing easement, a party-wall between the house purchased by M. and S.'s house adjoining, for a purpose antagonistical to the expressed design of S. in building the houses, by which the adjoining house was enlarged, not as a private residence, but for business purposes, may be restrained, though S. would have the right to build upon the party-wall if the object were to enlarge his house as a private residence (*Reversing S. C.*, 54 *How.*, 338; see *S. C.*, 53 *How.*, 311). (*Id.*)
3. S. is under no obligation to reform the character of the houses other than the one adjoining M.'s, because the changes made prior to the commencement of the action must be regarded as having been assented to by M., because they were allowed to be thus changed without objection. (*Id.*)

PENDENCY OF ANOTHER ACTION.

1. The defense of the pendency of another action must be taken by answer or demurrer; if not so taken it will be deemed to have been waived.

Where the answer sets up as a defense a final settlement and adjustment of the plaintiff's claims in a proceeding had in another court, proof of a proceeding then pending in that court is inadmissible. (*Remington* agt. *Walker*, 21 *Hun*, 322.)

PLACE OF TRIAL.

1. This action was brought in the county of New York, to restrain the defendant Johnson, who had in his possession a satisfaction-piece of a judgment recovered by the plaintiff against the defendant Nelson, from delivering the same to Nelson. The complaint showed that Nelson owned real property in Ulster, but none in Kings county. The defendant, upon an affidavit stating that Nelson had sold the land in Ulster county, and then owned no real estate except in Kings county, moved for an order changing the place of trial to Kings county, on the ground that the action was brought "to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property, or a chattel real;" within the meaning of section 982 of the Code of Civil Procedure:

Held, that whether or not the action was within that section must be determined by the complaint, and that the decision of that question could not be affected by affidavits. That the action did not have for its object the recovery of a judgment establishing or otherwise affecting a right, lien or other interest in real property, and the motion was therefore properly denied. (*Knickerbocker*

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Life Ins. Co. agt. Clark, 23 Hun, 506.)

PLEADINGS.

1. The complaint in an action upon a contract made by commissioners of highways set forth the contract, in which the defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally:

Held, that plaintiff was properly non-suited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, sec. 92), it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, sec. 108); also as it affected the place of trial. (*Boots agt. Washburn, 79 N. Y., 207.*)

2. *It seems*, that the provision of the Code of Civil Procedure (sec. 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. (*Cook agt. Jenkins, 79 N. Y., 575.*)
3. A supplemental complaint should not be allowed upon an *ex parte* application. (*Fleischmann agt. Bennett, 79 N. Y., 579.*)
4. Notwithstanding the mandatory language of the Code of Civil Procedure (sec. 544), it is the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular

case; such application, therefore, should be upon notice, so that both parties may be heard. (*Id.*)

5. Where, upon the facts presented, the allowance of a supplemental pleading is in the discretion of the supreme court, the exercise of this discretion by the special term may be reviewed by the general term, but not by this court. (*Id.*)
6. Where pleadings admit title to parties, this precludes objection that another has an interest, and should have been made a party. (*See Prentice agt. Janssen, 79 N. Y., 478.*)
7. Counter-claim not allowable in action for conversion. (*See F. S. Instn. agt. Nat. Bk. 80 N. Y., 162.*)
8. Complaint alleged that plaintiff "is a corporation," the answer admitted this:
Held, that the admission was not limited to time of answer. (*See Legrand agt. M. M. Association [Mem.], 80 N. Y., 638.*)
9. Where action is brought to recover back moneys alleged to have been fraudulently obtained, under color of a contract with the state by means of fraudulent pretenses, and vouchers, and by collusion with state officers, on failure to prove fraud a recovery *ex contractu* cannot be had; also, as to ratification by legislature. (*See People ex rel. agt. Denison [Mem.], 80 N. Y., 656.*)

POLICE.

1. The relator, a policeman, having been convicted by the police board upon a charge of receiving sums of money on several occasions from the keepers of houses of prostitution as an inducement for allowing certain privileges, was dismissed from the force:
Held, that under the law of 1873, giving the board power to dismiss any member on his conviction of

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a legal offense or neglect of duty, or any conduct injurious to the public welfare, or immoral conduct or conduct unbecoming an officer, though the relator could have been convicted and punished for the offense, yet it was not necessary to await a conviction in a court of criminal jurisdiction before instituting the inquiry. (*The People ex rel. Murphy agt. French et al.*, ante, 377.)

2. There being evidence to uphold the judgment of the board, and no rule of law having been violated, the judgment should not be disturbed. (*Id.*)

PRACTICE.

1. The attorney-general, in behalf of the people of the state, may maintain an action "against one or more trustees, directors, managers or other officers of a corporation to procure a judgment * * * compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge," and "compelling them to pay the corporation which they represent, or its creditors, any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost or wasted, by a violation of their duties," and "suspending a defendant from exercising his office when it appears that he has abused his trust" (*Code of Civil Procedure*, sections 1781, 1782). (*The People agt. Bruff*, ante, 1.)
 2. By section 1808 of the Code of Civil Procedure the attorney-general "must bring an action" for the purposes just enumerated, "if, in his opinion, the public interests require that an action should be brought;" and by section 1810, in an action brought for the objects specified, by the attorney-general,
- the court has power to appoint a receiver of the property of the corporation. (*Id.*)
3. When the president of a railroad company makes a contract with himself for the construction of a railway; when he obtains all the securities, stock and bonds under the pretense of paying the nominal contractor; when as chief engineer he makes to himself as contractor certificates of work done, and then as president pays himself many hundred thousand dollars in advance of what the nominal contractor was entitled to receive under the contract for construction, ample cause is shown for the appointment of a receiver, and the command of the statute to the attorney-general that he "must bring an action," becomes imperative. (*Id.*)
 4. Although it is true that, under section 1782 of the Code of Civil Procedure, a creditor of the corporation, or a trustee, director, manager or other officer of the corporation could bring an action, not to suspend or remove a director, but to recover for the corporation the assets and property which its officers had wasted, it is:
Held, that an action which had been so brought by K., one of the directors and one of the defendants herein, in which P., one of the defendants herein was made receiver, is no bar to the action brought by the state through its attorney-general as required by section 1808 of the Code. (*Id.*)
 5. Where the defendant in an indictment moves to quash the indictment for irregularity, a grand jury may be examined and testify to facts showing the irregularity, if it do not arise out of misconduct by the grand jury. (*The People agt. Briggs*, ante, 17.)
 6. If an indictment be improperly and irregularly found the defendant may, before plea, move upon

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affidavit to quash it for such irregularity. (*Id.*)

7. The moving affidavit may allege the facts constituting the alleged irregularity upon information and belief, if they should be within the knowledge of the district attorney; and if so alleged they may be sufficient to call upon him to dispute them if not correctly set forth in the moving affidavit. (*Id.*)
8. If an indictment be found or based wholly, or in part, upon evidence clearly incompetent and illegal it will be quashed and the defendant remanded, that his case may be passed upon by another grand jury upon competent and proper evidence.
9. *Quare.* Whether, if it be shown that an incompetent witness was sworn and gave testimony before the grand jury, the law does not presume that testimony to defendant's injury was given by such witness and cast the onus of showing the contrary upon the public prosecutor? (*Id.*)
10. Under section 2 of chapter 782 of the laws of 1876 a wife is not a competent witness *against* her husband, and cannot be called against him by the people without his consent. (*Id.*)
11. Right of defendant in an indictment to a list of the witnesses and copy of the testimony before the grand jury discussed by counsel but not determined by the court as the indictment was quashed. (*Id.*)
12. The plaintiff's attorney, when defendant's time to answer would have expired in five days, gave a written stipulation extending the time to answer twenty days:
Held, that the stipulation had the effect to give twenty days additional time to answer, and not fifteen days.
Held, further, that where the stipulation was signed on the sixth day of April, a demurrer served on the thirtieth was in time. (*Patterson et al. agt. O'Conner, ante, 141.*)
13. It was entirely proper to make a motion requiring the demurrer to be received, instead of delaying until after judgment was entered, and then moving to open the judgment. (*Id.*)
14. The defendant's right to serve his demurrer within the twenty days' extended time, is clear and a substantial one, and the order denying its exercise is appealable. (*Id.*)
15. In a proceeding for the examination of a third party, a receiver cannot be appointed without notice to the judgment debtor. (*Morgan agt. Von Kohnstamm, ante, 161.*)
16. Where such judgment debtor is entitled to the income for life of a trust fund under a will, the executors of the trust cannot be restrained from applying the proceeds of the trust. (*Id.*)
17. There was no authority under the former Code for the appointment of a receiver in a proceeding for the examination of a third party, alleged to have property of, or to be indebted to the judgment debtor. A receiver could be appointed only in a proceeding instituted for the examination of a judgment debtor. (*Id.*)
18. By the provisions of the Code of Civil Procedure, section 2464, a receiver cannot be appointed before an order or warrant, to be examined, is served upon the judgment debtor, without ten days' notice to the judgment debtor, unless he cannot, after due diligence, be found in the state. (*Id.*)
19. On a motion to set aside an order made by a county judge ap-

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pointing a receiver in supplementary proceedings where it appeared that an appeal was taken to the general term of this court, which appeal is still pending:

Held, that such appeal must be deemed to be a waiver of such irregularities if any there be, as are not brought up by it for review, and as to all such alleged irregularities and improper acts of the county judge as are covered by the appeal, they will be considered when the appeal shall be heard at general term. All action proper to be taken at special term, either to vacate it or correct it, should be taken before the bringing of the appeal from it to the general term. (*Tinkev agt. Langdon, ante, 180.*)

20. Where an order was made by a county judge declaring a judgment debtor in contempt, the order being made on the return of an order to show cause, the same having been duly served on the debtor, but without his presence and without the appearance of any one in his behalf:

Held, that it being taken against the debtor by default it was competent for him to move to set it aside for irregularity. The moving party was bound to make a case for the granting of the order on the merits, at least, the same as if the debtor had appeared and objected to the proceeding; and if he failed to make his case the debtor might and should move to set the order aside rather than to appeal. (*Id.*)

21. Can an appeal be taken from an order obtained by default for non-appearance? *Quære. (Id.)*
22. Although a county judge may, under section 298 of the Code of Procedure, appoint a receiver in supplementary proceedings, *it seems* doubtful whether he is authorized by law to order a conveyance by the debtor of his property to a receiver or to direct its de-

livery and possession to that officer. (*Id.*)

23. To punish as for a contempt for refusing to deliver property to a receiver, an order requiring such delivery is a necessary prerequisite. A simple demand of possession is not sufficient. (*Id.*)

24. Where the order appointing the receiver directed the debtor to assign and convey his lands and real estate, but contained no direction to the debtor to surrender its possession:

Held, that he could not be held in contempt for omitting or refusing to do what had not been commanded or required of him. (*Id.*)

25. In contempt proceedings a fine cannot be properly imposed arbitrarily and capriciously; but it must have a basis upon proof of damages or injury. (*Id.*)

26. The plaintiff's intestate in his lifetime having recovered judgment by default against the defendant Lee, and then assigned said judgment to one Sunderland, and subsequently the default being opened, and upon death of plaintiff's intestate an order made reviving the action and directing Sunderland to be brought in as party defendant, and the trial having then proceeded before the referee theretofore appointed, by consent, and judgment given in favor of defendant Sunderland against his codefendant Lee:

Held, that the trial having proceeded without objection until the merits of the controversy were determined, no question of irregularity can now be heard, as questions of regularity and practice should be raised by motion, and defendant's claim to a right of trial by jury not having been made before or at the trial, cannot now be listened to. (*Derham agt. Lee, ante, 334.*)

27. The referee did not exceed his

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power in giving to one defendant affirmative relief against his codefendant; sections 521 and 1204 of the Code being sufficient warrant for the decision and judgment. (*Id.*)

28. A copy of an account of defendant's firm as it appeared in the ledger of a foreign corporation, no objection being made for want of proper verification, was properly admitted as presumptive evidence, under sections 929, 930 and 931 of the Code, of the account of work done by the firm for the corporation. (*Id.*)

See INSURANCE COMPANY.

The People agt. *Globe Mutual Life Insurance Company*, ante, 57.

See ARREST.

Jones agt. *Platt*, ante, 73.

See INSURANCE COMPANY (LIFE.)

The People agt. *Globe Mutual Life Insurance Company*, ante, 82.

See STREET OPENINGS.

Matter of One Hundred and Thirty-eighth Street, ante, 290.

29. The defendant was tried and convicted of administering poison to the wife and children of one Taft, with intent to kill them. On the evening of January 26, 1879, a woman delivered at Taft's house a letter purporting to come from him, inclosing several small packages, of what purported to be medicine, but was in fact poison, and instructed her to administer the contents thereof to herself and children. The letter was delivered a few minutes before seven, of a dark evening, and the woman could only be identified by her voice, which was heard by Taft's eldest son, who opened the door, and by Taft's wife, who was in the house.

Mrs. Taft having testified that she recognized the voice to be that of the accused, was asked, on her cross-examination, if she did not

ask the son, when he came back into the room, who it was that brought the letter, and answered that she did. She was then asked by the prosecution, "what was said between Willie and you, about who it was that brought the medicine," and was allowed against the accused's objection and exception, to testify that Willie said it was Anna Cox, the accused:

Held, that the declaration of the son to his mother was mere hearsay, and that, as there was nothing in the testimony which made his answer competent by way of qualification or explanation, the court erred in admitting it. (*People* agt. *Cox*, 21 *Hun*, 47.)

30. The mother of the accused was called by the defense, and gave evidence tending to show that Anna was at home at the time the letter was delivered. Having stated on cross-examination that she did not know that Anna wrote a letter on the morning of the day the one in question was delivered, she was asked whether she did not tell certain persons named, that Anna had written a letter on the morning of that day, and replied that she did not. Subsequently, these persons were called, and allowed, against the accused's objection and exception, to testify that the mother had told them that Anna had written a letter on the morning of that day:

Held, that the mother having made no reference to the writing of the letter on her direct examination, the people, by attempting to prove by her that the daughter had written one on the day in question, made her for that purpose their own witness, and could not thereafter discredit her testimony, in regard to it, by showing contradictory statements made to other persons when not under oath.

The right to cross-examine a witness as to any fact for the purpose of discrediting him, by contradicting his testimony, by other

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witnesses, is limited to those matters which tend to contradict, discredit, vary, qualify or explain the testimony given by the witness, on direct examination. (*Id.*)

31. The plaintiffs and their predecessors, have, since 1863, published and offered for sale, as a system for teaching and learning penmanship, books containing the copies to be written, and also directions for learning, acquiring and practicing the said art, with such illustrations as are required to convey and explain the ideas sought to be inculcated. On the cover of each book was printed "Payson, Dunton & Scribner's National System of Penmanship," and the book has been called and known as the "National System of Penmanship."

The defendants thereafter published a book substantially in the same form, so far as its general appearance, binding and color was concerned, having upon the cover the words "Independent National System of Penmanship," such words being printed in the same manner, and the letters being of the same size and form, and occupying the same position as they do upon the cover of the plaintiff's book. The directions, instructions and illustrations contained in the two books were, in many cases, literally, and in the remaining cases substantially the same.

On an appeal from an order restraining the defendants from publishing or selling the said book, or any other book representing or imitating those of the plaintiffs, and from using the words "National System of Penmanship," in connection therewith, *held*, that as to the printed instructions, the injunction could not be maintained, for the reason that, if the plaintiffs had copyrighted their book, the United States courts had exclusive jurisdiction of all actions for an infringement thereof, and that if they had not copyrighted it, they had lost their

exclusive property in the said instructions and directions by publishing the same in a printed book and offering it for sale. (*Potter agt. McPherson*, 21 *Hun*, 559.)

32. That, so far as the injunction restrained the defendants from using the words "National System of Penmanship" in connection with their work, it was proper and should be affirmed. (*Id.*)

33. That the injunction was properly issued if it appeared that persons, desiring to purchase the plaintiffs' publication, might well accept that of the defendants, supposing and believing it to be the plaintiffs', even though persons engaged in the trade of buying the books, with an intention to resell them, might not be misled by the resemblance, and though the difference could be readily detected by a comparison of one book with the other. (*Id.*)

34. The plaintiff having demurred to an answer interposed by the defendant, the latter, within the time allowed by law, amended it. The plaintiff then procured an order striking out, as sham, false and frivolous, the second defense set up in the amended answer, and demurred to the first, third and fourth defenses contained therein. Afterwards the defendant, without procuring leave from the court so to do, served a third answer, setting up in due form his discharge in bankruptcy, this being the same defense insufficiently pleaded in the third defense of the amended answer. The third answer was returned by the plaintiff, on the ground that it could not be served without the leave of the court.

Thereafter the demurrer was sustained, the defendant being allowed to amend the said first, third and fourth defenses, within twenty days, on payment of the costs. Within that time, the defendant paid the costs, and

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served an answer, setting up simply his discharge in bankruptcy, such answer being the same one already served and returned by the plaintiff. The plaintiff returned this answer as unauthorized by the order sustaining the demurrer, and because it had already been served and returned; and thereafter entered a judgment in his favor, by default, as for want of an answer.

On a motion by the defendant to vacate the judgment and compel the plaintiff to accept the answer last served, *held*, that such answer was properly served, and that the plaintiff had no right to return it. (*Decker agt. Kitchen*, 21 *Hun*, 332.)

35. That the entering of the judgment by the plaintiff, after the service of the said answer, was not a mere irregularity, within the meaning of that term, as used in Rule 37, requiring the irregularity complained of to be specified in the notice of motion. (*Id.*)

36. Since the adoption of the Code of Civil Procedure the plaintiff can no longer treat an answer as a nullity and enter a judgment as upon a default; his only remedy in such a case is to apply to the court or a judge thereof, upon notice, as prescribed in section 537 of the said Code. (*Id.*)

37. In 1834, one Francis Child died, leaving a will, by which he devised certain land to his widow for life, with remainders to his three daughters, Jane Reed, Caroline Savage, and Mary Parsons. In 1845, a decree was made in an action of partition brought by the widow, by which the lot, to recover which this action was brought, was set off in fee to Mrs. Parsons, who died in 1847, leaving an infant daughter, now Mrs. Allen, to whom the lot descended. Subsequently a bill of review was filed by Jane Reed, and a judgment procured setting

aside the decree of partition, and all the proceedings thereunder. While the bill of review was pending, and in pursuance of an order of the chancellor, made upon the application of the father of Mrs. Allen, then an infant, the lot in question was sold to the widow, who thereafter conveyed it, by a full warranty deed, to the defendant. Mrs. Allen alluded in her answer to the bill of review, to this application, praying that in case a new partition were ordered, the rights of the purchaser might not be disturbed, and that the lots originally set apart to her mother might, on a subsequent partition, be set apart to her.

In a second action for partition, to which Mrs. Allen and the defendant were parties, the former put in the usual answer of an infant, and the latter suffered a judgment to be taken by default, in pursuance of the advice of his counsel. By the decree therein, the lot was again set off to Mrs. Allen.

In an action brought by Mrs. Allen to recover the lot so purchased by the defendant, the latter set up the foregoing facts, and prayed that she be compelled to execute a confirmatory deed of the lot to him:

Held, that neither the judgment on the bill of review, nor that in the second action for partition estopped the plaintiff from setting up the equities existing in his favor, but that he might set them up in this action, and procure herein the affirmative relief to which he was entitled. (*Esterbrook agt. Savage*, 21 *Hun*, 145.)

38. *Held*, further, that Mrs. Allen was estopped from claiming the land by the recitals contained in the deed of her special guardian, referring to the petition upon which the order for a sale was made, it being alleged therein that she was the owner in fee of the lot to be sold. (*Id.*)

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39. This action was brought upon a judgment recovered by the Rochester Bank against the defendant and others, and which the plaintiff claimed to own, by virtue of an assignment from the bank, and because he was the sole stockholder thereof at the time it ceased to do business. The judgment was recovered on a note made by and discounted for the defendant. The defenses set up in the answer herein were that the plaintiff never became the owner of, or paid value for the judgment; that, if any judgment existed, it belonged to one Clark, and that the plaintiff was not the real party in interest.

Upon the trial the defendant offered to prove by one Eldridge, one of the indorsers of the said note, and one of the judgment debtors, that he had paid the note to the president of the bank, the plaintiff, and requested him to bring the action against himself, the defendant, and another, in order that he might avail himself of the judgment to collect the amount thereof from the other parties. The testimony was rejected on the ground that it was immaterial, and tended to contradict a record, the witness having allowed a judgment by default to be recovered against him on the note:

Held, that it was error to exclude the evidence.

That it did not tend to contradict the record, but only to show an independent agreement affecting the ownership of the judgment.

That the fact that the particular defense sought to be established was not set forth in the answer, was immaterial, as the evidence was not rejected on that ground. (*Brown* agt. *Decker*, 21 *Hun*, 199.)

40. That it was also admissible as tending to show that the bank held the judgment as a trustee for the benefit of Eldridge, and that it did not, therefore, pass to the plaintiff, under the assignment, as

part of the assets of the bank. (*Id.*)

41. About January 1, 1878, the defendant entered into an agreement with his brother-in-law, William A. Bushnell, to the effect that he should conduct certain stock speculations for Bushnell's benefit, collecting information of such a character as to justify the purchase of stocks, and giving his time and attention to the purchase and sale thereof; for these services he was to receive one-third of the net profits; the margin to carry the account being furnished by Bushnell. The defendant knew that Bushnell was a book-keeper in the employment of the plaintiff, and had no means outside of his salary. On April 23, 1879, the defendant, claiming that his share of the profits amounted to \$6,818.48, received from Bushnell an order upon his broker for that sum, which was paid by the drawee.

On June eighth, Bushnell absconded, and it was then learned that he had stolen bonds from the plaintiff, and pledged them to secure his account with the broker, by whom some had been sold and others pledged. It appeared that the sum received by the defendant was in fact one-third of the profits actually made by him while conducting the account, and also that Bushnell had, without his knowledge, speculated on his own account, both before and after the times referred to. It was not shown that the defendant knew that Bushnell had stolen the bonds until after he had absconded.

The defendant having refused to account to the plaintiff for the amounts received by him, this action was brought to recover damages for the conversion of the bonds, and upon the trial thereof the court directed a verdict for the plaintiff, for the entire amount lost by the abstraction of the bonds, on the theory that the defendant and Bushnell were copartners in the transaction,

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and that the former was therefore liable for the acts of the latter:

Held, that this was error, and that the question as to whether or not a partnership existed between Bushnell and the defendant, should have been submitted to the jury. (*Butler* agt. *Finck*, 21 *Hun*, 210.)

42. *Quære*, as to whether, in any event, the defendant was liable for the amount actually received by him from Bushnell. (*Id.*)

43. On December 21, 1871, the plaintiff and the defendant entered into a written agreement, by which the latter was made the sole general agent for the sale of an encyclopedia, then being published by the plaintiff, upon the terms therein specified, the defendant agreeing that, after its completion, he would "take on an average at least one thousand copies of the entire work annually until the expiration of this agreement." Subsequently, a verbal agreement was made, by which the defendant agreed to print the work, the plaintiff simply furnishing the manuscript on plates, ready for the press.

This action was brought by the plaintiff to compel the defendant to account for the books printed and sold by him under the contract, the plaintiff alleging that the number of the books so printed and sold was unknown to him, and also to compel him to pay the agreed price for at least one thousand copies a year, though the number actually sold might have been less than that number. The court directed an interlocutory judgment for an accounting to be entered, but refused to allow the plaintiff to recover in this action for a failure of the defendant to take the number of copies specified in the agreement:

Held, that this was error, that the plaintiff was entitled, as an incident to the accounting, to charge the defendant in this action with the number of copies

he had agreed to take. (*Bonn* agt. *Steiger*, 21 *Hun*, 219.)

44. When an action is tried before the court without a jury, upon an admission that the allegations of the complaint are true, and no evidence is given by either party, the findings of the court should not deviate from the allegations of the complaint, either affirmatively or negatively. (*Id.*)

45. The plaintiff, claiming to be the owner of a lot in the city of Syracuse, brought this action to have a deed thereof, executed by the county treasurer, upon the sale of the lot for unpaid taxes, set aside, as a cloud upon her title, upon the ground that no notice to redeem had been given to the owner or occupant thereof:

Held, That, if section 12 of chapter 858 of 1867 (the act under which the sale was made) did not make applicable to proceedings under it, the provisions of the general laws of the State relating to the giving of a notice to redeem after a sale for taxes (1855, ch. 427, *secs.* 68-75), then no such notice was required, as the act of 1867 contained no provision requiring such notice to be given, and the defendant's deed was valid.

That if the provisions of the general laws on that subject did apply, then the plaintiff's right to redeem was still perfect, and as the defendant's deed would not entitle them to recover possession of the land without the production of the treasurer's certificate, showing a failure on the part of the owner or occupant to redeem after due notice had been given, the plaintiff had no occasion to come into a court of equity for relief.

That, in either event, this action could not be maintained. (*Stewart* agt. *Crysler*, 21 *Hun*, 285.)

46. Section 10 of chapter 858 of 1867 renders the deed conclusive evidence of the regularity of the sale, and prevents its validity

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from being attacked by proof of a misdescription of the land in the notice of sale.

Under section 34 of chapter 427 of 1855 the validity of a sale is not affected by any error in the description of the land in the printed notice of sale.

Quære, as to the constitutionality of these provisions. (*Id.*)

47. This action was brought by the people to restrain the defendant, a street railroad company, from laying its tracks in a portion of one of the streets in the city of New York. It was brought with the consent of the attorney-general, and was prosecuted by the attorneys for a rival railroad company, which had already brought a similar action against the defendant herein, in which it had been defeated, and a judgment rendered in favor of the defendant, which had been affirmed on appeal to the general term.

The complaint herein, having been dismissed upon the trial, the acting attorneys, without any express authority appealed to the general term. Thereafter, the attorney-general, upon the application of the attorneys for the defendant, signed a stipulation that either party might enter an order discontinuing the appeal without costs; the attorney-general holding that the action involved no question of public interest, but was a mere contest between rival companies, which had, in effect, been already decided in the former action between them. Upon this stipulation an order discontinuing the appeal was entered. Subsequently, the successor to the attorney-general who signed the stipulation for the discontinuance of the appeal, consented that the said order should be vacated and the appeal prosecuted if the court thought it could be done. Upon this consent, the attorneys who had brought the action procured an order, on an *ex parte* application,

vacating the order discontinuing the appeal, upon an appeal from that order and from one denying a motion made by the defendant to vacate it, *held*, that the order of discontinuance should not have been vacated without notice to the defendants.

That, upon the merits, the order discontinuing the appeal was properly made, and should not have been vacated. (*People agt. Central Cross-Town R. R. Co.*, 21 *Hun*, 476.)

48. Upon the trial of an action brought in the marine court of the city of New York by one Talcott, against one Salke, Talcott recovered a judgment, which was, upon appeal to the general term of the marine court, reversed, and a new trial ordered. Talcott then appealed to the general term of the court of common pleas, without giving the stipulation, required by chapter 545 of 1874, to the effect that judgment absolute might be rendered against him in the event of the affirmance of the order directing a new trial. The common pleas affirmed the order of the general term of the marine court, directing a new trial. Salke thereupon, claiming that the common pleas should have ordered a judgment absolute in his favor, procured a writ of prohibition, restraining Talcott and the marine court from taking any further proceedings in the action.

Upon an appeal from the order granting the said writ, *held*, that in the absence of the stipulation required by the act of 1874, the court of common pleas could not have ordered a judgment absolute in favor of Salke. (*People ex rel. Salke agt. Talcott*, 21 *Hun*, 591.)

49. That if the appeal could be taken without any stipulation having been given, the common pleas in considering the case were, by subdivision 2 of section 43 of chapter 479 of 1875, vested with a discre-

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tion as to the disposition to be made of it, which discretion was not reviewable at a special term of the supreme court on an application for a writ of prohibition.

That if the relator was aggrieved by any irregularity in the form of the judgment of the court of common pleas, he should apply to that court for the correction of the judgment.

That if the marine court had no authority to proceed further with the case, the relator could protect himself by raising the proper objections and by taking the proper exceptions when the case should be moved for trial, and by correcting any erroneous rulings thereon by appeal. (*Id.*)

50. This action was commenced in November, 1869, to foreclose a mortgage, the plaintiff praying for a judgment for any deficiency that might arise upon a sale, against the defendant Griswold, the mortgagor, and against the defendant Coe, upon an independent guaranty executed by him. Coe died on January 9, 1870. On January twentieth, the court directed the usual judgment of foreclosure and sale to be entered, as of January 6, 1870, *nunc pro tunc*. This judgment contained no provision charging the defendant, Coe, with any deficiency.

Upon a sale had in 1877, a large deficiency arose, the premises being purchased by one Wm. H. Grant, who was, upon the death of the original plaintiff, in 1878, appointed his executor. Thereafter, and on December 24, 1879, he, as such executor, moved to amend the said judgment, *nunc pro tunc*, as of January 6, 1870, by inserting therein a provision charging the said Coe with any deficiency that might arise upon the sale:

Held, that the court had no power to grant the motion, as the application, though in form one for leave to amend the judgment, was in reality one for leave to

enter an original judgment, by default, against Coe, some ten years after his death. (*Grant* agt. *Griswold*, 21 *Hun*, 509.)

51. That, even if the court had power to make the order, it erred in exercising it in this case, as no excuse was given for the long delay in making the application. (*Id.*)

52. In July, 1877, a claim against the estate of a deceased person was, pursuant to the statute, referred to J. L. Angle, Esq., to hear and determine. The trial was commenced on the 4th day of September, 1877, and continued by adjournments until December 22, 1877, when it was suspended without day. On December 30, 1877, the said J. L. Angle, was appointed a justice of the supreme court, to fill a vacancy therein, and on December 22 he accepted the said office and entered upon and continued to discharge the duties thereof until the expiration of the term for which he was appointed, viz.: December 31, 1878.

On August 10, 1878, the said J. L. Angle, as referee as aforesaid, made and filed his report in the case. Upon an appeal from an order denying a motion to vacate the report, on the ground that the referee was incompetent to act as such while holding the office of a justice of the supreme court:

Held, that the prohibition contained in section 25 of article 6 of the Constitution, was absolute and peremptory, and prevented any justice of the supreme court from acting as a referee.

That the facts that the trial of the action had been commenced before he was appointed a justice of the said court, and that he acted without making any charge for his services, did not relieve him from the said prohibition. (*Countryman* agt. *Norton*, 21 *Hun*, 17.)

53. That the provision could not be

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- waived by any stipulation or acts on the part of the defendant. (*Id.*)
54. That as the referee had since ceased to be a justice of the supreme court, his report should be set aside, and either party should be allowed to proceed with the reference on the evidence and proceedings as they stood on the 22d day of December, 1877. (*Id.*)
55. Chapter 733 of 1865, providing that when an administrator shall have been removed or suspended, or his letters of administration shall have been revoked, he shall be liable to account on the application of his successor, did not repeal the provisions of chapter 460 of 1837, as amended by chapter 229 of 1862, authorizing the surrogate to compel such an administrator to account, on the application of a creditor, or to take and state a final account upon the application of the removed administrator. (*Dunford* agt. *Weaver*, 21 *Hun*, 349.)
56. In an action against a sheriff for the escape of one held by him by virtue of a precept or mandate issued by a surrogate, upon a decree entered upon a final accounting, rendered by such person after letters of administration issued to him had been revoked, the sheriff cannot avail himself of any error in the decree, or in the process upon which the arrest was made, unless it be such as to render the latter absolutely void. (*Id.*)
57. In such an action the plaintiff, if successful, is entitled to recover as damages, under section 158, of the Code of Civil Procedure, the amount named in the warrant of commitment, with interest thereon, if it so provides. (*Id.*)
58. Evidence to show that the person arrested was insolvent, is not admissible in such an action, in mitigation of damages. (*Id.*)
59. Upon the trial a witness, called by the plaintiff to testify as to a conversation he had had with the defendant, said that he could not say what the defendant had stated in it. Subsequently he was asked what impression that conversation made upon his mind:
Held, that the question was properly excluded. (*Wilder* agt. *Peabody*, 21 *Hun*, 376.)
60. Upon the trial of this action the defense called one George Morse for the purpose of impeaching the plaintiff's character, he having been sworn as a witness. Morse having testified that the plaintiff's general character for truth and veracity was bad, was asked, and allowed, against the plaintiff's objection and exception, to answer in the affirmative the following question: "Did Mr. Wilder (the plaintiff) state to you in a certain conversation that he regarded it as no wrong to swear falsely against such a man as Albert Morse?"
Held, that it was error to allow the question to be put and answered, as it called for a specific declaration upon a collateral matter to which the attention of the plaintiff had not been called on his cross-examination. (*Id.*)
61. On July 20, 1875, the plaintiff, — a receiver appointed in supplementary proceedings instituted against one H. C. Sutcliffe, upon a judgment recovered against him by one Ferris, — recovered a judgment, in an action brought against the said H. C. Sutcliffe and his son William, declaring the said Ferris judgment to be a lien upon certain land conveyed by a third person to William, and upon a building erected thereon, on the ground that the money for the purchase of the land and the erection of the building was furnished by the father. On an appeal taken by William the judgment was affirmed by the general term, but reversed by the court of appeals

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- on the grounds that a receiver in supplementary proceedings could not enforce the trust arising in favor of the father's creditors, by reason of his having furnished the money for the purchase of the land; and that as to the building it was not shown that the money was advanced by the father with an intent to defraud his creditors. H. C. Sutcliffe having died, pending the appeal to the general term, the plaintiff, in October, 1879, applied for and procured an order substituting H. C. Sutcliffe's administrators as a defendant, vacating the judgment entered against him, and ordering a new trial:
- Held*, that the order was proper and should be affirmed. (*Underwood* agt. *Sutcliffe*, 21 *Hun*, 357.)
62. Where a defendant, in an action brought against him by his wife, for a limited divorce, fails to comply with the terms of an order requiring him to pay a certain sum of money to her attorney to meet the expenses of the suit, he is guilty of a contempt for which the court may issue a precept committing him to jail. (*Strobridge* agt. *Strobridge*, 21 *Hun*, 288.)
63. Upon the return of an order, requiring the defendant to show cause why he should not be committed for failing to comply with the terms of such an order, he cannot show, in opposition to the motion, that his pecuniary circumstances are such as to render him unable to pay the moneys thereby required to be paid. (*Id.*)
64. An application under 2 Revised Statutes, 538, section 20, for relief, on the ground of the applicant's inability to comply with the requirements of the order, must be made to the court, upon notice to the adverse party.
- Semble*, that the remedy afforded by the said section was intended for those only who are actually imprisoned. (*Id.*)
65. In order to give a justice of the peace jurisdiction of an application to sell animals, seized under chapter 459 of 1862, as amended by chapter 814 of 1867, while trespassing upon the lands of the applicant, the complaint must allege that the animals escaped upon the land from the highway. (*Coles* agt. *Burns*, 21 *Hun*, 246.)
66. It is improper to allow the complaint to be amended by the insertion of this allegation after the defendant has answered, and the case has been called for trial. (*Id.*)
67. The term "running at large," as used in section 1 of the said act, implies permission or assent, or at least some fault or neglect on the part of the owner of the animals.
- Where animals escape from their owner's premises, after due precautions to secure them have been taken, and without any default or neglect on his part, and he thereafter makes immediate and suitable efforts to secure and recover them they cannot be said to be "running at large," within the meaning of the said act. (*Id.*)
68. The plaintiff having brought an action against the defendants, upon a doubtful claim for a large amount, it was verbally agreed between the parties that the defendants should pay to the plaintiff \$150, in consideration of his agreeing to discontinue and settle the suit. The plaintiff thereafter tendered his consent to the discontinuance of the suit, together with a release, but the defendants failed to pay the \$150 as agreed. The release and discontinuance were never accepted, nor were they left with the defendants or their attorney.
- The plaintiff then brought this action to recover the \$150, averring mutual promises, with a fulfillment on his part and a breach on the part of the defendants:
- Held*, that the agreement to set-

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tle the pending suit, being entirely unexecuted, was not binding upon the plaintiff, and would have been no bar to the original suit, unless executed by the acceptance of the \$150.

That there was, therefore, no consideration for the defendants' promise to pay the \$150.

That the action could not be maintained. (*Panzerbeiter* agt. *Waydell*, 21 *Hun*, 161.)

69. One Lampert, while returning home, after attending at the marine court in a proceeding to which he was a party, was arrested upon an execution against his person, issued upon a judgment recovered against him in that court by one Faendler. After he had given bail for the limits, and been discharged from custody, a writ of *habeas corpus* was issued to the sheriff, commanding him to bring Lampert before one of the justices of the supreme court, to which the sheriff made a return that he was unable to obey the writ, for the reason that Lampert was not in his actual custody. Upon the hearing, at which Lampert voluntarily appeared, an order was made directing that Lampert be released from the execution, and discharged from all imprisonment in pursuance thereof:

Held, that Lampert was not at the time of the issuing of the writ imprisoned by the sheriff, nor was his bond for the limits such a restraint by that officer as authorized a resort to the writ of *habeas corpus*.

That the writ could not be issued to inquire into a mere matter of temporary privilege by which the applicant was exempted from arrest, but that his remedy for a violation of such privilege was by an *ex parte* application to the court before which he was attending, or to the court out of which the process had issued.

That the proceedings should have been dismissed with costs. (*Matter of Lampert*, 21 *Hun*, 154.)

70. In this action, brought upon two promissory notes given for goods sold and delivered to the defendant, the latter set up a discharge in bankruptcy under a composition, to which defense no reply was interposed by the plaintiff. Upon the trial the plaintiff was allowed, after the discharge in bankruptcy had been proved, to give evidence to show that the indebtedness for which the notes were given had been fraudulently contracted:

Held, that a discharge under a composition in bankruptcy did not discharge the defendant from a debt fraudulently contracted. (*Argall* agt. *Jacobs*, 21 *Hun*, 114.)

71. That it was not necessary for the plaintiff to serve any reply. (*Id.*)

72. That the fact that the action was brought upon the notes instead of upon the original indebtedness, did not prevent the plaintiff from proving fraud in the contracting of the debt to avoid the effect of the discharge in bankruptcy interposed by the defendant. (*Id.*)

73. A motion for a new trial on the ground of surprise cannot be made upon the minutes of the justice before whom the action was tried. (*Id.*)

74. This action was brought by the plaintiff to recover the damages occasioned by an alleged slander. The complaint charged that the defendant "did, sometime during the month of September, 1879, at the city of New York, falsely, wrongfully and maliciously speak, utter and publish the following false, defamatory and actionable words of and concerning the plaintiff, in the German language, in the presence and hearing of divers persons, all of whom understood the same;" it then set forth the language in German and English, and alleged that by reason of the speaking of such words the plain-

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tiff "was greatly injured in his fame, reputation and good name as a physician, and in his earnings, profits and income as such," and that he had sustained great damages.

Upon an application by the defendant for a bill of particulars, *held*, that the plaintiff should be required to furnish a bill of particulars specifying at what place or places, and in the presence of what person or persons, the words were claimed to have been spoken. (*Stiebeling* agt. *Lockhaus*, 21 *Hun*, 457.)

75. That as the allegations as to the injury to the earnings, profits and income of the plaintiff as a physician, were not sufficient to allow him to prove special damages in particular instances, upon the trial, it was unnecessary to order a bill of particulars in those respects. (*Id.*)

76. This action was brought to recover moneys alleged to have been fraudulently embezzled and misappropriated by the defendant while acting as a book-keeper for the plaintiff. Upon a motion to vacate an order of arrest granted herein, the court below found that a portion of the sum sought to be recovered had probably been fraudulently appropriated by the defendant, and that the residue had been obtained and used by him, with the plaintiff's knowledge and consent, and—*held* that, inasmuch as the demand, upon which an order of arrest could have been properly granted, had been united with one upon which it could not be granted, that the order should be vacated:

Held, that the order was properly vacated:

To authorize the granting of an order of arrest, under subdivision 4 of section 549 of the Code of Civil Procedure, as amended in 1879, the complaint must allege the cause of action, therein set forth, to be fraudulent or to have

been fraudulently contracted, and must limit the application for the order to such cause of action. (*Easton* agt. *Cassidy*, 21 *Hun*, 459.)

77. The plaintiff in an action, being a non-resident, was required by an order, made on the application of the defendant, to file a bond as security for the costs of the action, and pay ten dollars costs of the motion, within ten days. Within that time the plaintiff filed the bond, but neglected to pay the costs. Thereafter, on the defendant's application, the complaint was dismissed, and a judgment for the costs entered in his favor.

In an action brought by him against the sureties to the said bond, to recover the costs of the action, *held*, that by procuring a dismissal of the complaint, the defendant, in legal effect, refused to accept the bond, and that the same never went into effect or became operative.

That the sureties were not liable thereon, and that the action could not be maintained. (*Remington* agt. *Westermann*, 21 *Hun*, 440.)

78. It is no objection to an order of arrest granted under subdivision 4 of section 550 of the Code of Civil Procedure, that it prescribes the form of the undertaking to be taken by the sheriff, if such form corresponds with that required by subdivision 1 of section 575 of the said code.

So much of section 551 of the Code of Civil Procedure as provides that, in a case specified in subdivision 4 of section 550, an order of arrest can only be granted by the court, is not applicable to the first judicial district, and in the said district such an order may be made, by a judge out of court, at any time. (*Boucicault* agt. *Boucicault*, 21 *Hun*, 431.)

79. Under section 770 of the Code of Civil Procedure, any application, except for a new trial upon the merits, which, elsewhere, must

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be made in court, may, in the first judicial district, be made at any time to a judge out of court. (*Id.*)

80. In an action brought by a wife against her husband, to procure an absolute divorce on the ground of adultery, an order for his arrest may be granted under subdivision 4 of section 550 of the Code of Civil Procedure. (*Id.*)

81. In this action, brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, the latter was personally served with the summons and complaint on March 4, 1880, at Nice, in France, where she resided, in pursuance of an order directing the service of the summons by publication. On April 16, and before the time for the defendant to appear and answer had expired, she moved to set aside the order directing the service of the summons by publication, on the ground that, as the action was one in which an attachment could not issue, no judgment could, under section 1217 of the Code of Civil Procedure, be entered against her by default:

Held, that, as the defendant's time to appear and answer had not expired when the motion was made, and as no attempt to enter a judgment by default had been made, the motion was properly denied as premature.

That the order for the service of the summons by publication was properly granted, even though the plaintiff might not thereafter be able to show such a state of facts as would authorize him to enter any judgment against the defendant in case she failed to appear or answer. (*Clarke agt. Boreel*, 21 Hun, 594.)

82. On December 27, 1876, this proceeding was commenced to vacate an assessment for paving a street in the city of New York, which

had been confirmed in 1869, on the ground that the ordinance directing the work to be done had not been published as required by the charter. Upon the hearing, it appeared that while the list was in the hands of the collector, and prior to January 1, 1871, the assessment upon twenty-four of the parcels, amounting to \$6,661.68, had been paid; that the assessment upon five of the thirty-one remaining parcels, returned to the bureau of arrears as unpaid, had been paid before this proceeding was commenced; that the assessment upon all the others had been vacated by orders of the supreme court, made in 1871, 1872 and 1873, and that two of the lots, upon which the assessments had been paid, had changed hands, and now belonged to different persons:

Held, that, as it appeared that the assessment had been partly enforced and paid, and that some of the lots had changed hands, thereby rendering it impossible to do justice to the other property owners, if the assessment upon the petitioner's lot should be vacated, his application should be denied on account of his laches in instituting the proceedings. (*Matter of Lord*, 21 Hun, 555.)

83. Where, in an action brought by a wife to procure an absolute divorce from her husband on account of his adultery, the complaint alleges that the adultery was committed with a woman named therein, such woman cannot, upon the failure of the defendant to appear and answer, be made a party to the action and be allowed to answer and defend the same upon the merits. (*Clay agt. Clay*, 21 Hun, 609.)

84. The court will, however, require notice to be given to her counsel of all proceedings to take testimony in the action, and will allow her to be present and cross-examine the witnesses produced,

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to be herself sworn as a witness and give her testimony, and to have summoned and examined such witnesses as she may desire. (*Id.*)

85. This action was brought to recover a balance due on an account for caps sold and delivered by the plaintiffs to the defendants. The answer was a general denial. Upon the trial, the plaintiffs having proved the manufacture and shipment of the caps, pursuant to a contract, and rested, the defendants proved that the caps were imperfect, in that the crowns were not properly stitched to them, and came off, thereby rendering them unsalable, and that they had, for that reason, returned them to the plaintiffs. The plaintiffs then offered to disprove the statement made by the defendants as to the alleged defect in the caps; but the evidence was excluded on the ground that they should have offered the testimony before closing their case:

Held, that it was error to exclude the evidence.

That the plaintiffs were justified in resting their case upon proof of the manufacture and delivery of the goods, and were not obliged to prove that particular defects therein, which the defendants might set up as a defense, did not in fact exist. (*Bancroft* agt. *Sheehan*, 21 *Hun*, 550.)

86. This appeal was taken from a judgment dismissing the complaint in this action, which was brought to have certain railroad bonds, issued by the town of Greenwood, canceled, on the ground that an act (*chap. 638 of 1874*), which undertook to cure certain irregularities in the petition for their issue, was invalid. Upon the hearing of the appeal, it appeared that the validity of the bonds, and of the act in question, had already been passed upon by the general term of the fourth department, upon an appeal from

an order made in this action, continuing a temporary injunction granted therein, and that the judgment below conformed to this decision:

Held, that the former decision of the general term should be accepted as final and conclusive. (*Rogers* agt. *Rochester, &c., R. R. Co.*, 21 *Hun*, 44.)

87. Under section 1342 of the Code of Civil Procedure, no appeal can be taken to the supreme court from an order affecting a substantial right, made by a court or judge, unless it was made in an action brought in a court of record. (*Fish* agt. *Thrasher*, 21 *Hun*, 15.)

88. No appeal lies from an order of the county court, denying a motion for a new trial, where the action was brought in a court not of record, and subsequently came into the county court on appeal from a judgment of the court below. (*Id.*)

89. Upon an application to vacate an order made herein, on February 13, 1880, directing the defendant to appear and be examined in proceedings supplementary to execution, it was shown that the defendant had already been examined herein, in pursuance of an order made on June 17, 1872, and that such examination had been completed and a receiver appointed. The affidavit upon which the second order was granted made no reference to the previous application:

Held, that the order was properly set aside for that reason. (*Grocers' Bank* agt. *Bayaud*, 21 *Hun*, 203.)

90. *Quære*, as to whether a second application to examine a judgment debtor may be made *ex parte*, or whether notice thereof must be given. (*Id.*)

91. Where, in an action brought

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against a firm, consisting of two members, an attachment is issued, and thereafter one of the partners is personally served with the summons, but the other is not, nor are proceedings to serve him therewith by publication commenced within the thirty days required by the statute, the attachment ceases to be a lien upon the firm property. (*Donnell* agt. *Williams*, 21 *Hun*, 2.6.)

92. The failure to state in an affidavit, upon which an application for an attachment is made, that the plaintiff is entitled to recover the sum specified therein, over and above all counter-claims known to him, as required by section 636 of the Code of Civil Procedure, renders the attachment void *ab initio*. (*Id.*)

93. In an action by the plaintiff to recover for services rendered to the defendant, the latter set up, as a counter-claim, that the plaintiff was a trustee of a manufacturing corporation, and that, by reason of his failure to file the annual report required by law, he had become personally liable for the debts of the company, some of which were held by the defendant at the time of his default, which debts he sought to set-off against the plaintiff's claim herein:

Held, that the counter-claim was not based upon a contract, as required by section 501 of the Code of Civil Procedure, and that it should be stricken out. (*Clapp* agt. *Wright*, 21 *Hun*, 340.)

94. Section 1013 of the Code of Civil Procedure,—authorizing the court to order a compulsory reference, where the trial will require the examination of a long account, and will not require the decision of difficult questions of law,—is applicable as well to such actions as are of equitable, as to such as are of legal cognizance.

The only effect of the last clause of the said section is to authorize

the court to appoint a referee to decide some of the issues, less than the whole, or to report findings upon one or more specific questions of fact.

In no case can the court order the compulsory reference of an action, where the trial will not require the examination of a long account, or will require the decision of difficult questions of law. (*Dane* agt. *Liverpool, &c., Ins. Co.*, 21 *Hun*, 259.)

95. The defense of the pendency of another action must be taken by answer or demurrer; if not so taken it will be deemed to have been waived.

Where the answer sets up as a defense a final settlement and adjustment of the plaintiff's claims in a proceeding had in another court, proof of a proceeding then pending in that court is inadmissible. (*Remington* agt. *Walker*, 21 *Hun*, 322.)

96. The rendering of an account to a surrogate by an executor or administrator, and the settlement of the account, after it has been rendered, are separate and distinct proceedings. (*Id.*)

97. Under section 757 of the Code of Civil Procedure, as amended in 1879, providing that "in case of the death of a sole plaintiff or defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest," it is the duty of the court to continue the action, if it survives or continues, without regard to whether or not the applicant has been guilty of laches in making the motion. (*Greene* agt. *Martine*, 21 *Hun*, 136.)

98. Under the provisions of the Code of Civil Procedure, relating to the examination of parties before trial, the court cannot refuse to grant an order for the examination of a

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- party to an action actually pending, nor has it any greater or different power to limit the extent of such examination than it has to limit the examination of any witness upon the trial.
- So far as the questions put to the witnesses are relevant to the issues to be tried, the party examined must answer them.
- The right of examination cannot be limited by any rule of the courts. (*Harrold* agt. *New York, &c., R. R. Co.*, 21 *Hun*, 268.)
99. When the sheriff has become liable as bail, by reason of the failure of the original sureties to justify, he may exonerate himself by surrendering the principal to the jail before the expiration of the time to answer, or within such time thereafter as the court may deem just to prescribe. (*Douglass* agt. *Haberstro*, 21 *Hun*, 320.)
100. But to entitle the sheriff to an order, allowing him to surrender the principal after the time to answer has expired, he must show a substantial and sufficient excuse for permitting the defendant in the execution to be at large. (*Id.*)
101. An appeal will not lie to the general term of the supreme court from an order of the county court, made in an action commenced in a justice's court, and brought into the county court by appeal. (*Roberts* agt. *Marson*, 21 *Hun*, 363.)
102. Where one charged with petit larceny elects to be tried by a court of special sessions, it is not essential to the validity of a conviction that all the magistrates should concur therein; the judgment of the majority is the judgment of the court. (*People ex rel. Sammons* agt. *Wandell*, 21 *Hun*, 515.)
103. An infant accused of petit larceny may waive his right to a trial by jury, and elect to be tried by a court of special sessions. (*Id.*)
104. In an action to recover damages for a conversion of personal property, the costs exceeded the verdict recovered by the plaintiff, and a judgment for such excess was entered in favor of the defendant: *Held*, that as the judgment was recovered in an action for a tort, the plaintiff could be imprisoned under an execution against his person issued thereon. (*Philbrook* agt. *Kellogg*, 21 *Hun*, 238.)
105. Under the Code of Civil Procedure, a party has no right to interpose an unqualified denial in a verified answer, unless it be founded upon personal knowledge; and where he has no positive knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted, but bound at his peril, to deny upon information and belief. (*Brotherton* agt. *Downey*, 21 *Hun*, 436.)
106. Costs cannot be allowed upon the granting of an *ex parte* order requiring the defendant to file his answer. (*Edlefson* agt. *Duryee*, 21 *Hun*, 607.)
107. The objection that an indictment has no caption, or that it does not show in what court it was presented or found, cannot be raised after a conviction, by a motion in arrest of judgment. (*Gray* agt. *People*, 21 *Hun*, 140.)
108. Actions to recover penalties incurred by a violation of the excise law within the city of Yonkers, must, under chapter 109 of 1878, be brought by the commissioners of charities thereof, and not by the board of commissioners of excise. (*Commissioners of Excise* agt. *Glennan*, 21 *Hun*, 244.)
109. Where an admission in a pleading is coupled with an affirmative allegation, the adverse party cannot rely upon the admission unless he accepts it as modified by the

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accompanying allegation. (*Vanderbilt agt. Schreyer*, 21 Hun, 537.)

110. On November 18, 1879, the board of supervisors of Livingston county adopted a resolution appointing a committee to inquire who were railroad commissioners for the town of North Dansville, if any, with authority to send for persons and papers, and take such proof of the subject-matter as to them might seem expedient, and if it appeared that any person or persons were reputed to be in occupation of such office, to notify him or them to appear before the committee and inquire when and by whom, and for what term of office, such reputed commissioners had been appointed. The relator, the supervisor of the said town, who was appointed chairman of the said committee, made an affidavit setting forth facts tending to show that no railroad commissioners had been lawfully appointed for the said town; that a tax had been imposed upon it and collected, the proceeds of which it was his duty, as supervisor, to pay to such commissioners, to be applied upon the principal and interest of certain bonds issued by the town; that certain persons claiming or reputed to act as such commissioners had been duly notified and summoned to appear before the said committee and produce certain documents, and that they had neglected and refused so to do. Upon this affidavit a justice of the Supreme Court, acting under chapter 190 of 1858, granted an attachment for the arrest of the persons so summoned, and thereafter vacated the same on condition that no action for false imprisonment should be brought on account of the arrest:

Held, that as the proposed inquiry was not instituted to enable the board of supervisors to discharge any duty imposed upon it by law, or to enable them to look after the affairs of the county or

protect its interests, and the commissioners were not officers of the county, neither the said board nor the committee had jurisdiction of the subject-matter of the proposed inquiry, and that the attachment was properly vacated. (*Faulkner agt. Morey*, 22 Hun, 397.)

111. That, as it was vacated for a want of jurisdiction over the subject-matter, the court could not impose, as a condition thereof, a requirement that no action of false imprisonment on account of the arrest should be brought. (*Id.*)

112. The plaintiff, a corporation, alleged in its complaint that it had issued two certificates of stock, numbered respectively three and four, to one Williams, who had transferred them to the defendant Hamlin; that certificate No. 3 had been presented to it by Hamlin, and that the same had been canceled and a new certificate had been issued to him therefore; that certificate No. 4, having been lost by Hamlin, wrongfully came into the hands of Williams, and through him to the defendant Alberger, who presented it to the plaintiff, and demanded that it should enter the transfer to him upon its books; that Alberger also claimed to be the owner of the other certificate transferred to Hamlin; that the plaintiff, before notice of the claim of Alberger, believing the certificate No. 4 to have been lost, had issued a new certificate therefor to Hamlin, which was still outstanding; that the plaintiff feared that Alberger demanded the transfer to be made, with the intent of bringing an action against it to recover the penalties imposed by chapter 40 of 1848, for its refusal to transfer the stock; that the plaintiff was unable to determine the respective rights of the parties, and feared that it might be exposed to injury by reason of the issue of the said certificate to Hamlin. It prayed

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for a judgment determining the respective rights of the parties, and that if Alberger had no interest in the certificate, it might be delivered up and canceled:

Held, that, upon the facts stated, the plaintiff had no right to bring the controversy into a court of equity; and that as it was not entitled to the judgment demanded, a temporary injunction, restraining the defendant from disposing of the said certificates or prosecuting any action or proceeding against the plaintiff for its refusal to transfer the stock upon its books, was improperly granted and should be vacated. (*Buffalo Grape Sugar Co. agt. Alberger*, 22 *Hun*, 439.)

113. During the pendency of this action and prior to the recovery of a judgment herein, the defendant procured from the Court of Common Pleas of the city of New York, an order directing him to make an assignment of all his property, and discharging him from his debts, under the "Two-Third Act." Thereafter this order was, upon the plaintiff's application, vacated, and the discharge canceled on the ground that it was fraudulently and irregularly procured. From this last order the defendant appealed to the general term of the common pleas, and procured a stay of all proceedings in the court of common pleas during the pendency of such appeal. Thereafter, the plaintiff having recovered a judgment in this action and instituted proceedings to procure the appointment of a receiver, the defendant obtained an order staying all proceedings in this action pending the stay granted by the common pleas.

Upon an appeal from that order, *held*, that the stay of proceedings was in effect an injunction staying proceedings upon a judgment for a sum of money, within sections 513 and 618 of the Code of Civil Procedure, and could only

be granted upon the payment of the amount thereof into court, or upon security therefor being given as therein provided. (*Eastman agt. Starr*, 22 *Hun*, 465.)

114. That in the absence of any averment of fraud or error, it would be subversive of right and contrary to precedent to stay the enforcement of a valid and regular judgment, without statutory authority, merely because another court might hereafter decide that the defendant was entitled to be discharged from his debts. That the order should be reversed. (*Id.*)

115. The plaintiff's grantor purchased in 1863, certain premises, at a sale under a decree in an action brought to foreclose two mortgages thereon, given by the defendant and her husband upon property belonging to the husband, to which action the defendant had not been made a party. The amount realized upon the sale was more than sufficient to pay the amount due upon the two mortgages, together with the expenses of the proceedings. The holder of a third mortgage, given by the defendant and her husband, was made a party to the action.

In this action, brought by the plaintiff for a strict foreclosure of the two mortgages as against the defendant, *held*, that the purchaser at the sale, and the plaintiff as his grantee, acquired the interest of the husband in the premises released from the lien of the third mortgage, and also so much of the two mortgages as remained unenclosed.

That the premises were incumbered by the defendant's contingent dower interest therein, which interest, however, was subject to the two mortgages, which in respect thereto were unenclosed and were held by the plaintiff. (*Ross agt. Boardman*, 22 *Hun*, 527.)

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116. That as the purchaser, and the plaintiff, as his grantee, had been for years in the possession and enjoyment of the property and the receipt of its rents and profits, an accounting should be had to determine the amount which the defendant should be required to pay to redeem and protect her interest in the premises. (*Id.*)
117. That the judgment should provide that upon her failure to pay the same within the time therein prescribed, all her interest in the property should be extinguished. (*Id.*)
118. That the question as to whether costs should be awarded for or against the plaintiff, should be reserved until the coming in of the referee's report. (*Id.*)
119. No appeal lies to the general term from an order of the county court denying a motion for a new trial, made in an action originally commenced in a justice's court. The appeal should be taken from the judgment entered in the county court. (*Perry agt. Round Lake Camp Meeting Ass., 22 Hun, 293.*)
120. The defendant was created a corporation by chapter 617 of 1868, its property and place of business being situated in the county of Saratoga; its shareholders and trustees reside in different counties of the state. Its business has been transacted in Saratoga county, except that its trustees have met in the counties of Albany and Rensselaer. In an action commenced against it by the plaintiff in the Albany justice's court, a long summons was served upon its secretary, who resided in Albany county:
Held, that the defendant was a resident of Saratoga county, and that, being a non-resident of Albany county, the justice's court acquired no jurisdiction over it by the service of the summons. (*Id.*)
121. On January 2, 1878, the defendant, a collector of taxes, in pursuance of a warrant directing him to collect from one Oliver Porter the sum of \$19.30, levied upon a wagon and other property belonging to him, which was then upon a lot owned by Porter's wife, the plaintiff, upon which they then resided, and whereon the said Porter had been accustomed for many years to keep this and other property. On January 19, the defendant, having satisfied the demand of the warrant by the sale of the property other than the wagon, returned it to the plaintiff's lot, although she had on January 9, forbidden him to put it upon her premises. January 19 the plaintiff sued the defendant in a justice's court for trespass in wrongfully entering upon her premises and leaving the wagon there, and recovered a judgment for six cents damages and \$6.60 costs. On January 22, 24, 26, 29, and February 4, 1878, the plaintiff brought other actions against the defendant, alleging that he had wrongfully left the wagon on her lot on January 19, and refused to move it on the above-mentioned dates, although requested so to do by the plaintiff, in each of which actions she recovered nominal damages and costs:
Held, that the injury to the plaintiff's rights was the direct result of a single act of the defendant, in thus entering and leaving the wagon upon her premises, and that the judgment recovered in the first action was a satisfaction thereof, and a complete bar to the actions subsequently brought. (*Porter agt. Cobb, 22 Hun, 278.*)
122. This action was brought by the plaintiff, as the committee of one Sarah Mitchell, to have certain conveyances of real and personal property, made by her to the defendant, adjudged void and set aside, on the ground that the

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defendant, knowing that the said Mitchell was of unsound mind and incapable of managing her affairs, fraudulently induced her to transfer the said property to him without receiving any consideration therefor. In 1878 the said Sarah Mitchell was found by an inquisition to be, and for the past eight or nine years to have been, of unsound mind, and incapable of managing her affairs. The defendant, who was wholly insolvent, and had been in possession of the property, and collected the rents and profits thereof, from the time the conveyances were made, in 1870 and 1871, denied that he obtained the conveyances by duress, undue influence, or by means of any trick, unlawful or fraudulent practice, and alleged that they were voluntarily executed and delivered by the grantor in the exercise of an unfettered will and an unclouded reason:

Held, that the case was a proper one in which to appoint a receiver *pendente lite*. (*Mitchell* agt. *Barnes*, 22 *Hun*, 194.)

123. Where, in an action brought against several defendants, each appears by a separate attorney and interposes a separate defense, and all succeed in their defenses, each of them is, under section 305 of the Code, entitled to a separate bill of costs, unless the severance be made in bad faith and for the purpose of increasing the costs.

In this action, brought against the defendants as copartners, each appeared by a separate attorney and served a separate answer. The defendant Robert, who resided in this state, appeared by a Mr. Sawyer. The defendant James, who was a non-resident, having left the state to avoid his creditors, and having no property herein, subject to attachment, was served by publication and appeared by a Mr. Day. The notice of the retainer of Mr. Sawyer for Robert was in the handwriting of Mr. Day, and the answers were

identical; that of James being copied and verified in the office of the attorney for Robert:

Held, that the severance of the action was in bad faith; and that but one bill of costs should be allowed to the defendants. (*Williams* agt. *Cassady*, 22 *Hun*, 180.)

124. Where an application is made by defendants who have successfully interposed separate defenses, to have separate bills of costs taxed, under section 305 of the Code, the clerk has no power to refuse to allow them so to do, on the ground that the separate defenses were unnecessarily and collusively interposed. The remedy of the party aggrieved is to apply to the court by a motion, for the relief sought. (*Id.*)

125. In an action upon a bond given by the defendants as sureties for one Hack, conditioned that the latter should faithfully perform his duties, as agent of a life insurance company, and pay all indebtedness to the plaintiff, it appeared that in an action previously brought by the plaintiff against Hack, he had caused him to be arrested under an order granted therein, and had subsequently released him from such arrest, upon his confessing a judgment for the amount due to the plaintiffs:

Held, that his so doing did not prevent his maintaining this action upon the bond. (*Emery* agt. *Baltz*, 22 *Hun*, 434.)

126. The defendants sought to set up as counter-claims, causes of action existing in favor of Hack against the plaintiff:

Held, that as Hack was not a party to this action, the defendants could not avail themselves of them. (*Id.*)

127. Effect of a verbal promise by the obligee of a bond to the sureties thereon, that if the principal named in the bond did not pay

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over moneys collected promptly he would stop his business and notify the sureties, considered. (*Id.*)

128. The plaintiff, a married woman, having brought this action, under the civil damage act, to recover the damages resulting from the intoxication of her husband, alleged to have been caused by liquor sold to him by the defendant, the same was, after issue joined and before trial, settled by the parties, the defendant paying to the plaintiff thirty dollars, and each party agreeing to pay their own costs. The plaintiff executed to the defendant a release of the cause of action, under seal, and a stipulation, upon which an order discontinuing the action was entered. Thereafter, upon an application made in the name and behalf of the plaintiff, an order was made, setting aside and vacating the settlement and discontinuance, upon the ground that it was made in fraud of the rights of the plaintiff's attorneys:

Held, that the settlement having been made in good faith between the parties, it was, as against the plaintiff, a bar to the further prosecution of the action by her, or to her suing again for the same cause of action. (*Murray* agt. *Jibson*, 22 *Hun*, 386.)

129. That, so far as the rights of the plaintiff's attorneys were concerned, they must be enforced in proceedings to be instituted by them and in their own name. (*Id.*)

130. Writs of error and of *certiorari* will issue from the supreme court to review a trial and conviction had in the city court of Brooklyn, upon an indictment found in the court of sessions and transferred to the city court for trial. (*People ex rel. Flaherty* agt. *Neilson*, 22 *Hun*, 1.)

131. During the trial of the plaintiff

in error upon an indictment, charging him with a conspiracy to defraud the city, the judge called one of the jurors and the counsel for the prosecution and the defense into a room, and after showing to the juror an anonymous letter, which stated that the juror had been in the habit of playing cards with the sons of the plaintiff in error, asked him if he knew who wrote it, to which the juror replied, that he did not. The judge then said, that it was "very embarrassing and unpleasant, and, toward a juror, monstrously unjust, and a serious imputation." The plaintiff in error was not present, and the judge said, when the counsel for the plaintiff in error attempted to speak, that "he did not expect counsel to make any observations." There was no proof that the facts stated in the letter were true, nor was the juror asked if they were true:

Held, that the conviction should be reversed, as the tendency of this action, by the judge, was to dominate the juror's free will, and terrify him into a verdict for the people. (*Id.*)

132. This action was commenced by one Taylor More to recover certain real property, together with damages for the withholding thereof. After the joinder of issue herein, More died, leaving a will, by which he devised one-third of his property to his wife, the plaintiff, and the other two-thirds to his minor children. Thereafter an order was made reviving and continuing the action in the name of the plaintiff, individually, and as guardian in socage of the children, in the place and stead of the original plaintiff. In an amended answer served by the defendants, no specific objection to the right of the plaintiff as guardian in socage for her children to have the action so revived and continued, was taken.

Held, that as no appeal had been

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- taken from the order so reviving and continuing the action, the case stood as though the action had been originally commenced by the plaintiff, to recover in her own right the part of the premises devised to her, and as the guardian in socage of her children, the part devised to them, and that such an action was clearly maintainable. That the court had, under 3 R. S. (6 ed.), 575, and the Code of Civil Procedure, section 757, power to so revive and continue the action. (*More agt. Deyoe*, 22 *Hun*, 208.)
133. In an action to recover real property, those who claim to be the owners thereof are properly joined as defendants with the tenants who are in possession under them. (*Id.*)
134. Where an order is made requiring the special guardian of an infant to mortgage its real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot, after having received the money, refuse to pay one of the said debts, on the ground that the infant is not liable therefor. (*Matter of Lampman*, 22 *Hun*, 239.)
135. When such special guardian renders an account of his proceedings, and procures an order confirming his report, without notice to the debtor whose claim he has knowingly refused and neglected to pay, such order furnishes no protection to him, and the same will, on the application of the creditor, be vacated, and the guardian will be directed to pay to such creditor his proportionate share of the proceeds of the mortgage. (*Id.*)
136. In such a case the guardian should be required to pay interest on the amount which the creditor was entitled to receive, from the date of the order confirming his report. (*Id.*)
137. An order directing the real estate of an infant to be mortgaged for the payment of its debts should contain a statement of the objects to which the avails thereof are to be applied, and should not refer to any other paper for a specification of such objects. (*Id.*)
138. The report of the referee in such proceeding should also specify such objects, and should not refer to the evidence for a statement thereof. (*Id.*)
139. In an action by the plaintiff, to recover damages for an alleged conversion of certain wood by the defendant, the latter alleged as a counter-claim, that the wood in controversy was the product of trees grown upon certain lands upon which it had a mortgage; that the plaintiff, being a junior mortgagee in possession, and knowing that the lands were an insufficient security for the payment of the defendant's mortgage, and that the mortgagor was insolvent, wrongfully and fraudulently, and with intent to cheat and defraud the defendant, and to impair the security of its mortgage, committed waste on the said premises, by cutting the said wood, to the defendant's damage of \$500:
Held, that the cause of action set up in the counter-claim was "connected with the subject of the action," and that it might be pleaded as a counter-claim, though the action was for a tort. (*Carpenter agt. Manhattan Life Ins. Co.*, 22 *Hun*, 49.)
140. *Quare*, as to whether or not a plaintiff, by replying to a counter-claim, waives his right to insist that the matters therein set up are not the proper subject of a counter-claim. (*Id.*)
141. Executors and trustees can only maintain an action to obtain a construction of a will in those

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- cases in which some continuing duty — some trust which requires and will require action for some time to come — is imposed upon them thereby. The fact that an executor is about to close up the estate, and that the parties interested therein do not agree as to the construction to be given to certain provisions of the will, and as to the distribution of the property thereunder, does not authorize the executor to maintain an action to obtain a construction of the will; such questions should be raised and settled upon his final accounting before the surrogate. (*Powell* agt. *Demming*, 22 *Hun*, 235.)
142. In proceedings instituted under section 375 of the Code of Procedure, to require one joint debtor, not originally summoned to answer the complaint, to show cause why he should not be bound by the judgment entered against his co-debtor, the fact that an action upon the original contract would then be barred by the statute of limitations constitutes no defense, provided that the statute had not run at the time the action was originally commenced against the defendant upon whom the summons was served. (*Maples* agt. *Mackey*, 22 *Hun*, 228.)
143. Under section 1023 of the Code of Civil Procedure, and the other sections thereof touching the subject, a judge or referee cannot be required or permitted to make additional findings of fact or of law upon the settlement of the case, after his report or decision has been rendered. (*Palmer* agt. *Phoenix Ins. Co.*, 22 *Hun*, 224.)
144. So far as rule 32 conflicts with these sections it is inoperative. (*Id.*)
145. A defendant who has appeared before a referee and been examined, in pursuance of an order made in proceedings supplementary to execution, is entitled to a written notice of an application for the appointment of a receiver; a verbal notice that such an application will be made, given at the close of the examination, is not sufficient. (*Ashley* agt. *Turner*, 22 *Hun*, 226.)
146. A judgment of the United States circuit court, though docketed in a county clerk's office, still remains a judgment of that court, and an action can be brought thereon without first obtaining leave from the court so to do, as is required by section 71 of the Code, when an action is to be brought upon a judgment recovered in a court of this state. (*Goodyear Dental Vulcanite Co.* agt. *Frisselle*, 22 *Hun*, 174.)
147. The constable having allowed the jurors, after they had retired, to come into the court-room, they while there, found upon the floor and took back to the jury room with them, a memorandum of the items of damages, made by the plaintiff's attorney and used by him in summing up. The court, upon the jury subsequently applying to it for instructions, discovered that they had this memorandum, and, upon ascertaining how they had obtained it, took it from them, remarking that they had no right to it and must give no heed to it. The damages, as found by the jury, agreed with the directions contained in the charge of the court, in regard thereto:
Held, that a motion to set aside the verdict, based upon this irregularity, was properly denied. (*Dolan* agt. *Aetna Ins. Co.*, 22 *Hun*, 396.)
148. A motion, under section 572 of the Code of Civil Procedure, to discharge a defendant held in actual custody under an order of arrest, on the ground that the plaintiff has neglected to enter judgment in the action within

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one month after it was in his power so to do, need not be made in the judicial district or in the county adjoining the judicial district in which the action is triable, but may be made to a judge of the court in which the action was commenced, within the county where the defendant is held in custody. (*Sumner* agt. *Osborn*, 22 *Hun*, 13.)

149. The right of the defendant to a discharge depends upon the fact of his being held in actual custody, and not upon the fact that the plaintiff or his attorney knew that he had been surrendered by his bail, and was so held. (*Id.*)

150. On January 2, 1873, the defendant, who had been and was then acting as attorney for the plaintiff's mother, who was the administratrix of her deceased husband, and the general guardian of his children, gave to her a receipt stating that there was due to her, as guardian of her children, the sum of \$1,500, and as next of kin of two deceased children, \$1,000, "payable according to a decree of the surrogate of the county of New York, interest to be paid on the money," semi-annually. The decree directed the shares to be paid to the general guardian of the infants. The plaintiff's mother died in 1876. On July 19, 1877, Andrew Koch was appointed general guardian, and on October 15, 1877, guardian *ad litem* for the plaintiff:

Held, that the plaintiff could, by his guardian *ad litem*, maintain an action against the defendant to recover his share of the fund received by the latter from the plaintiff's mother. (*Segelken* agt. *Meyer*, 22 *Hun*, 6.)

151. In this action, brought by the plaintiff upon a policy of insurance issued by the defendant to her upon the life of her husband, one of the defenses was that the

husband had committed suicide, and thereby avoided the policy. When the case was brought on for trial, several of the jurors stated, on being examined by the defendant's counsel, that they should consider the fact that a man had committed suicide as some evidence of insanity; some stating that they should so consider it in some cases, and all stating that they should require other and additional evidence to establish it:

Held, that the jurors were competent, and that a challenge interposed by the defendant's counsel was properly overruled. (*Hagadorn* agt. *Conn. Mut. Life Ins. Co.*, 22 *Hun*, 249.)

152. In October, 1878, the plaintiffs brought an action in a justice's court, against the defendants, in the second of the above-entitled actions, to recover damages for the conversion of certain wheels. The plaintiffs having recovered a judgment, the defendants appealed to the county court, where a new trial was had, and a verdict rendered in favor of the defendants. The defendants in that action, besides denying the plaintiff's ownership of the wheels, claimed to have a lien upon them for work and labor thereon. Thereafter these actions were brought to recover for the conversion of the same wheels:

Held, that the former judgment only showed that some one of the defenses interposed by the defendants in the former action had been decided in their favor, and that it constituted no bar to the second of the above entitled actions. (*Woodworth* agt. *Seymour*, 22 *Hun*, 245.)

153. *Quære*, as to whether it was admissible for the plaintiffs to show that the county judge had, in his charge, decided the question of ownership in their favor, and taken that question from the jury. (*Id.*)

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154. Where, in an action brought to recover damages for a failure of the defendant to perform an agreement as to the sale of a plantation, alleged in the complaint to be situated in the state of Louisiana, the defendant, in her answer, set up as a counter-claim that the plaintiff, while in possession of "Live Oaks," "the said plantation," unnecessarily injured, wasted and damaged it to the amount of not less than \$10,000, it nowhere appearing from the said answer, except by reference to the complaint, that the plantation was situated in another state; a demurrer to the counter-claim on the ground that the court had no jurisdiction of the subject thereof—as being founded upon an injury to real property situated in another state—cannot be sustained. (*Cragin* agt. *Quitman*, 22 *Hun*, 101.)
155. In this action, brought to obtain a partition of certain real estate, a receiver *pendente lite* was appointed, with direction to collect the rents and divide the net proceeds thereof between the plaintiff and the defendant. Thereafter, one Man, having recovered a judgment against the defendant upon which an execution had been issued and returned unsatisfied, applied for an order directing the receiver to pay the amount due on the judgment to him, from the defendant's share of the rents:
Held, that the application was properly denied. (*Verplanck* agt. *Verplanck*, 22 *Hun*, 104.)
156. *Seem*, that the remedy of the judgment creditor was to come into the action and press it to a judgment, after which his claim might be paid from the proceeds of a sale of the premises, or if an actual partition was decreed, the share set off to the judgment debtor might be sold. (*Id.*)
157. Where a demurrer interposed to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is sustained, and leave is given to the plaintiff to amend his complaint within twenty days, on payment of the costs, an interlocutory judgment to that effect must be entered before the time, within which the plaintiff must amend his complaint, will commence to run. (*Liegeois* agt. *McCrackan*, 22 *Hun*, 69.)
158. Nor can a final judgment dismissing the complaint with costs, be entered, until such an interlocutory judgment has been entered. (*Id.*)
159. Where leave to enter the final judgment on the failure of the plaintiff to comply with the terms of the interlocutory judgment is not given by the decision, application for leave to enter it must be made as upon a motion. (*Id.*)
160. The complaint in this action alleged that the plaintiff and the defendant Walter, were co-partners, and that the firm had become insolvent; that the other defendants had, by collusion with the defendant Walter, commenced actions against the firm in the marine court of the city of New York, in which attachments had been issued, under which property of the firm had been seized; that such attachments were void, for the reason that the firm had a place of business in the city of New York, though both of the members thereof resided in Kings county. The relief sought was the dissolution of the firm, the appointing of a receiver, the vacating of the attachment, and also that the said defendants might be restrained from further prosecuting their actions in the marine court:
Held, that as to the attaching creditor, the complaint did not state facts sufficient to constitute a cause of action, and that it

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- should be dismissed. (*Fielding* agt. *Lucas*, 22 *Hun*, 22.)
161. Upon an application for an order to compel the defendant to appear and be examined before the trial, the existence of a cause of action is not established by allegations in the affidavit, stating simply that the "action is brought to recover damages for certain breaches, on the part of defendant, of a contract in writing." (*Hale* agt. *Rogers*, 22 *Hun*, 19.)
162. Although the affidavit may be made by the attorney, the materiality of the testimony of the witness must be alleged, upon his own knowledge, or, if it be made upon information, the sources thereof must be given. (*Id.*)
163. This action was brought by the plaintiff to restrain the defendant, the commissioner of public works of the city of New York, from taking down and removing, as a public nuisance, a building erected by the plaintiff partly upon land belonging to her and partly upon a portion of the street in front thereof. Upon a trial, had before the court without a jury, the complaint was dismissed with costs. Thereafter, upon the plaintiff's application, an order was made restraining the defendant from interfering with the plaintiff's building, pending an appeal taken by her from the judgment rendered against her: *Held*, that it was error to grant the order, and that the same should be reversed. (*Emmons* agt. *Campbell*, 22 *Hun*, 582.)
164. Where two foreign corporations, created under statutes of Great Britain, have entered into an agreement, which provides that certain matters shall be submitted to arbitrators, to be appointed and to act in New York, and that all questions as to the regularity or validity of the proceedings shall be determined by the English court of queen's bench, the supreme court will not restrain either party from proceeding before such arbitrators because the other party alleges that the said arbitrators were not properly and legally appointed. (*Direct U. S. Cable Co.* agt. *Dominion Tel. Co.*, 22 *Hun*, 568.)
165. A tenant in possession under a lease executed by a receiver, appointed in an action brought against executors holding as such a leasehold interest in the premises, is not a tenant of such executors, so as to authorize one who has purchased their interest in the premises at a sale thereof, under an execution issued on a judgment recovered against them, to institute summary proceedings to remove him therefrom, under chapter 101 of 1879. (*People ex rel. Higgins* agt. *McAdam*, 22 *Hun*, 599.)
166. Where proceedings to so remove such tenant from the possession of the premises are instituted by such purchaser, the court will, on the application of the receiver, grant a writ of prohibition, restraining the justice before whom the proceedings are instituted, from hearing or determining the same. (*Id.*)
167. Prior to the adoption of sections 2125 and 2126 of the Code of Civil Procedure there was no statute nor rule of law prescribing any fixed period within which a writ of *certiorari* must be applied for, but the decision of that question was left to the discretion of the court to which the application was made. On April 5, 1879, the defendant, the mayor of New York, certified to the governor that he had removed the relator from his office of police commissioner. From that time until January 27, 1880, when the case of *The People* agt. *Nichols* was decided by the court of appeals,

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the right of the relator to review such removal by a writ of *certiorari* was in dispute. On February 2, 1880, the relator applied for and obtained a writ of *certiorari*:

Held, that the court below properly held that he was guilty of no laches which would authorize a denial of the writ. (*People ex rel. Smith* agt. *Cooper*, 22 *Hun*, 515.)

168. In this action, brought by the plaintiff to recover the price of two hundred and sixty-six bales of rags sold to the defendant, the latter before answering, made an affidavit stating that the defense was that the sale was fraudulent and void, and that the goods were not what they were falsely and fraudulently represented to be; that in opening some of the bales they were found to contain about one-quarter in weight of substances other than rags, which were of no pecuniary value; that a return of the goods was thereupon tendered to, and refused by the plaintiff; that the plaintiff had thereafter attached the said goods, and that the same were then in the possession of the sheriff, and that the defendant was, therefore, unable to inspect or examine them; that he desired to examine the plaintiff, to prove the contents of the bales not yet opened, and to prove the fraudulent and deceitful packing and arrangement thereof, and to prove the plaintiff's knowledge of and connection with such frauds:

Held, that an order for the examination of the defendant was properly granted. (*Sprague* agt. *Butterworth*, 22 *Hun*, 502.)

169. That if, upon the examination, any questions were put to the plaintiff, the answers to which would tend to criminate or degrade him, or to subject him to a penalty or forfeiture, he could then claim his privilege. (*Id.*)

170. In this action, brought by the

plaintiff to foreclose a mortgage given by the defendant, the usual judgment of foreclosure and sale, and for any deficiency that might arise thereon, was entered on January 8, 1879. On June 13, 1879, the plaintiff obtained an order vacating the judgment, and allowing him to amend by bringing in an additional party. Thereafter, and before any further proceedings were taken, another action was commenced to foreclose a prior mortgage upon the same premises, and under a decree in the latter action they were sold for an amount only sufficient to pay the said first mortgage and the costs of its foreclosure. Thereupon the plaintiff moved to vacate the order setting aside the judgment, and for a direction that a judgment for a deficiency be entered against the defendant for the full amount due on the second mortgage and the bond to which it was collateral:

Held, that the motion was properly denied, and that the plaintiff's remedy, if any, was by an action at law upon the bond. (*Loeb* agt. *Willis*, 22 *Hun*, 508.)

171. The defendant in this action, having been arrested and given bail, his sureties neglected to justify, of which fact the sheriff had notice, but owing to some understanding between one of his deputies and the defendant, never lodged defendant in jail, but suffered him to go where he pleased:

Held, that the defendant was not "in actual custody" within the meaning of section 572 of the Code of Civil Procedure, authorizing one in actual custody, by virtue of an order of arrest in an action, to apply for a *supersedeas* if the plaintiff failed to issue an execution against his person within one month after it is within his power so to do. *Quare*, as to whether the old practice authorizing the court to refuse the *supersedeas* where the execution is issued after the service of the

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motion papers, but before the hearing, has been abolished by the Code of Civil Procedure, (*Watt* agt. *Healy*, 22 *Hun*, 491.)

172. The plaintiff having been arrested by virtue of an execution against his person, issued upon a judgment for costs recovered by the defendant herein, moved for and obtained, at special term, an order setting the execution aside unconditionally, which order was, upon appeal, reversed by the general term, but affirmed by the court of appeals. After the granting of the order by the special term, the plaintiff commenced, and is still prosecuting, an action against the defendant for false imprisonment. After the affirmance of the order of the special term by the court of appeals, the defendant moved to have it so modified as to make the relief thereby granted conditional upon the plaintiff stipulating not to bring an action for false imprisonment, or to continue the action already brought therefor:

Held, that the motion was properly denied. (*Catlin* agt. *Adirondack Co.*, 22 *Hun*, 493.)

173. The defendant also moved to have the costs awarded to the plaintiff by the special term and court of appeals, set off against the costs awarded to it, and included in the final judgment, in the action in which the execution had issued:

Held, that the motion should have been granted, particularly as the plaintiff was shown to be insolvent. (*Id.*)

174. A sale of real estate, under a decree of foreclosure, will not be set aside because the notice of sale was not published in all the editions of the paper issued on the days on which the notice was published. (*Everson* agt. *Johnson*, 22 *Hun*, 115.)

175. Under section 292 of the Code

of Procedure, supplementary proceedings cannot be instituted where a transcript of a justice's judgment for less than twenty-five dollars, exclusive of costs, has been filed, and an execution issued thereon has been returned unsatisfied. (*Wolf* agt. *Jordan*, 22 *Hun*, 108.)

176. When the facts on which an order of arrest is granted are not extrinsic to the cause of action, but the nature of the action alone furnishes the authority for granting it, it should not be vacated upon the evidence tending to disprove the existence of the cause of action; the merits of the controversy should not be determined upon affidavits, but should be allowed to await the trial of the action. (*Peck* agt. *Lombard*, 22 *Hun*, 63.)

177. Upon the dismissal of an appeal from a county court to the supreme court, the costs must be adjusted by the clerk, upon notice, in the usual way, and they cannot be taxed by a judge of the court, under section 811 of the Code. (*Andrews* agt. *Long*, 22 *Hun*, 24.)

178. Where, upon an appeal to the court of appeals from an order granting a new trial, the court affirms the order, and renders a judgment absolute in favor of the respondents, in pursuance of section 194 of the Code of Civil Procedure, the sureties upon the undertaking, given by the appellants, are liable for all the costs in the action, and not simply for those incurred by the appeal to the court of appeals. (*Burdett* agt. *Lowe*, 22 *Hun*, 588.)

179. When the court of appeals reverses a judgment in favor of the plaintiff, and orders a new trial, with costs to abide the event, and on the second trial, the plaintiff again recovers a judgment, he cannot tax, in his favor, the costs

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of the reversal by the court of appeals. (*First Nat. Bank* agt. *Fourth Nat. Bank*, 22 Hun, 563.)

180. One who, in an action brought to foreclose a mortgage, has recovered a judgment for a deficiency arising on the sale, against the executor of the deceased mortgagor, cannot maintain an action to secure and apply to the payment thereof surplus moneys arising on the foreclosure of another mortgage, given by the same mortgagor upon different property, without alleging his inability to collect the judgment out of the personal estate of the deceased. (*Fliess* agt. *Buckley*, 22 Hun, 552.)

181. Section 568 of the Code of Civil Procedure, authorizing a motion to vacate an order of arrest, founded upon proof by affidavit on the part of the defendant, to be made "to the court, or if the order was granted by a judge out of court, to any judge of the court upon notice," is not in conflict with nor does it abrogate the provisions of section 769 of the said Code, which requires all motions, upon notice, in an action in the supreme court, to be made within the judicial district in which the action is triable, or in a county adjoining it, except that when it is triable in the first judicial district, the motion must be made therein. (*Sutton* agt. *Sabey*, 22 Hun, 557.)

182. Surplus moneys arising upon a sale had under a decree entered in an action brought to foreclose a mortgage, after the death of the mortgagor and owner of the premises, are to be regarded as realty, and an action brought by one claiming to have a lien thereon, to have the same established and the moneys divided among those entitled to receive them, must, under section 982 of the Code of Civil Procedure, be brought in the county in which the premises were situated and

the surplus moneys deposited. (*Fliess* agt. *Buckley*, 22 Hun, 551.)

183. Where a railroad company wrongfully refuses to receive and transport goods, tendered to it by one who offers to comply with the terms established by it in reference thereto, the remedy of the party aggrieved is by an action at law to recover the damages sustained thereby, and as the remedy afforded to him by such action is an appropriate and adequate one, a *mandamus* compelling the company to receive and transport such goods, will not be granted. (*People ex rel. Ohlen* agt. *N. Y. L. E. & W. R. R. Co.*, 22 Hun, 533.)

184. In an action at law against a common carrier for a wrongful refusal to receive and transport property, the party aggrieved is entitled to recover as damages, the difference between the value of the property at the place where it was tendered to the company, and its value at the place to which it was to be taken, less the expenses of transportation. (*Id.*)

185. On hearing of an unsuccessful application to dissolve a temporary injunction granted in this action, the defendants' counsel confined his objections to alleged defects in the plaintiff's papers, and did not use affidavits relating to the merits of the action, which he had previously prepared. Upon the trial of the action the complaint was dismissed.

Upon a reference ordered to ascertain the damages sustained by reason of the injunction, held, that the sureties to the undertaking were not liable for the costs and expenses of the unsuccessful application to dissolve the injunction. (*Langdon* agt. *Gray*, 22 Hun, 511.)

186 Where, after the return unsatisfied of an execution, issued upon a judgment recovered against a

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corporation, the judgment creditor commences an action against it in equity for the appointment of a receiver, and procures therein a final judgment appointing a receiver, such receiver may, under chapter 403 of 1860, commence separate actions against each of the stockholders thereof to recover any sum remaining due upon his shares of stock, and he is not bound to bring one action and make all the creditors and stockholders parties thereto. (*Van Wagenen* agt. *Clark*, 22 *Hun*, 497.)

187. Upon the return of an order requiring the relator to show cause why he should not be attached for a criminal contempt, in forcibly and willfully resisting the lawful order and process of the court, such proceedings were had that the court adjudged him to have been guilty of the said contempt and ordered that he be imprisoned in the county jail for thirty days and pay a fine of \$250:

Held, that for the purpose of reviewing these proceedings upon a *certiorari*, they must be deemed to have been terminated by the entry of the final order, convicting the relator of the contempt, and sentencing him to pay the fine and be imprisoned, and that it was error to quash the writ on the ground that the proceedings were not terminated because no warrant of commitment had yet been issued. (*People ex rel. Gilmore* agt. *Dona-hue*, 22 *Hun*, 470.)

188. Under general rule No. 30, the testimony taken before a referee must be filed with his report, and until this is done the filing is incomplete, and the time within which exceptions to the report must be filed and served does not begin to run. (*Pope* agt. *Perault*, 22 *Hun*, 468.)

189. Although a stenographer is not obliged to part with his notes until his bill has been paid, yet, if he do deliver them to the referee

to be examined by him and used as the basis of his report, he cannot limit the effect of such delivery, and it is the duty of the referee to file them with his report, even though the fees of the stenographer remain unpaid. (*Id.*)

190. In an action by one of several residuary legatees to recover his share of the estate, a demurrer interposed by the executor, the sole defendant, on the ground that the other residuary legatee should be made parties thereto, cannot be adjudged frivolous. (*Leavy* agt. *Leavy*, 22 *Hun*, 499.)

191. In an action to rescind a sale on the ground of fraud, it is sufficient to produce upon the trial and offer to surrender the notes given for the goods purchased; no tender of them need be made before the commencement of the action. (*Navigatuck Cutlery Co.* agt. *Babcock*, 22 *Hun*, 481.)

192. An attachment which has become invalid by reason of the failure of the plaintiff to serve the summons, either personally or by publication, within thirty days from the time it was issued, is not revived and rendered valid by the subsequent appearance of the defendant in the action. (*Blossom* agt. *Estes*, 22 *Hun*, 472.)

193. A decision overruling a demurrer interposed to an indictment, and directing that judgment be given for the People, unless the accused plead over, cannot be reviewed upon a *certiorari*, before a judgment has been entered on the decision. The court cannot review the decision before entry of judgment, even though the counsel for both of the parties agree that it may so review it. (*People* agt. *Beman*, 22 *Hun*, 283.)

194. In the absence of any motion or act, on the part of a defendant, upon the trial of an action from

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- which an assent to a decision of the case by the court and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. (*First Nat. Bk. of Springfield* agt. *Dana*, 79 N. Y., 108.)
195. Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it. (*Cowing* agt. *Altman*, 79 N. Y., 167.)
196. So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. (*Id.*)
197. The complaint in an action upon a contract made by commissioners of highways set forth the contract, in which defendants were described as commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally:
Held, that plaintiff was properly non-suited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 R. S., 473, sec. 92), it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 R. S., 476, sec. 108); also as it affected the place of trial. (*Boots* agt. *Washburn*, 79 N. Y., 207.)
198. Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of evidence relating to the same subject-matter. (*Church* agt. *Howard*, 79 N. Y., 415.)
199. The defendant, in an action in a court of record, is not bound to avail himself by way of counterclaim, of an independent cause of action, existing in his favor against plaintiff. The rule in this respect was not changed by the Code. (*Brown* agt. *Gallaudet*, 80 N. Y., 413.)
200. The attention of the court must be called to the precise point intended by an exception, otherwise it will not avail. (*Schile* agt. *Brokhahus*, 80 N. Y., 614.)
201. An appeal from an order of general term affirming a judgment is premature and unauthorized; judgment should first be entered and the appeal taken from the judgment. (*Kilmer* agt. *Bradley*, 80 N. Y., 630.)

PRINCIPAL AND AGENT.

1. An agent authorized to receive payment of interest accruing on a mortgage and to collect the principal, and who received a portion of the principal before it was due, is not authorized to extend the payment of the mortgage debt after it became due. (*Ritch* agt. *Smith et al.*, ante, 13.)
2. To uphold the granting of such extension the agent should have been specially authorized thereto, or it should appear that the act was embraced within the powers allowed to be performed, or was ratified. (*Id.*)
3. While a principal is presumed to have notice of the acts performed by his agent in the usual course

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of his agency, such presumption does not extend to acts clearly not within the agency. (*Id.*)

4. The payment of a part of a mortgage debt after due, in itself affords no adequate consideration for an agreement made by an agent to extend the payment of the residue of the principal, or to discharge a surety. (*Id.*)
5. An agent authorized to receive payment of interest accruing on a mortgage and to collect the principal, and who received a portion of the principal before it was due, is not authorized to extend the payment of the mortgage debt after it became due. (*Ritch agt. Smith et al., ante, 157*)
6. To uphold the granting of such extension the agent should have been specially authorized thereto, or it should appear that the act was embraced within the powers allowed to be performed or was ratified. (*Id.*)
7. Where the plaintiff and agent were father and son residing in different states, the latter in the same city with those who were to make payments:
Held, that although this relationship might imply greater confidence in management and an easier disposition to ratify unauthorized acts, it does not imply an express prior authority to do unusual and undesirable acts. (*Id.*)
8. While a principal is presumed to have notice of the acts performed by his agent in the usual course of his agency, such presumption does not extend to acts clearly not within the agency. (*Affirming Same Case, ante, 18.*) (*Id.*)

PRIVILEGED COMMUNICATIONS.

1. One Foster, the owner of a lot upon which was a mortgage for \$1,000, owned by one Root, and

one for \$500, owned by one Crosby, entered into negotiations with the defendant Wright for the sale of the lot to him, subject to the Root mortgage, upon the agreement that he should pay the Crosby mortgage. While the negotiations were pending, Foster, Crosby and Root each called upon one Howe, an attorney, and requested him to draw such papers as might be necessary to carry out the agreement between them, which he did. Thereafter Foster conveyed the lot to Wright by a deed, containing a clause by which the latter assumed the payment of the Root mortgage. Wright also agreed to and did thereafter pay and discharge the Crosby mortgage.

In an action to foreclose the Root mortgage, and hold Wright liable for any deficiency that might arise on a sale, he claimed that the deed, though absolute on its face, was intended as a mortgage, and that he was not liable, upon the covenant, for the assumption of the Root mortgage contained therein:

Held, that the relation of attorney and client did not exist between Wright and Howe, so as to render the testimony of the latter, as to the declarations and acts of the parties relating to the agreements entered into between them, inadmissible, under section 835 of the Code of Civil Procedure. (*Root agt. Wright, 21 Hun, 344.*)

RAILROADS.

1. The holder of a limited ticket, bearing an agreement upon its face that it was good only between the date of its purchase and the end of the day designated by the punch mark on its margin, is not entitled to use such ticket after the expiration of such date, if it be the fault of the passenger that the ticket has expired before he has arrived at his destination. (*Auerbach agt. New York Central*)

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and Hudson River R. R. Co., *ante*, 382.)

2. The Long Island Railroad Company was incorporated April 24, 1834 (*chap.* 178, *Laws of* 1834), and by virtue of an act of the legislature, passed April 2, 1836 (*chap.* 94, *Laws of* 1836), it, on the first day of December, 1836, leased a road belonging to the Brooklyn and Jamaica Railroad Company, a corporation formed under chapter 256 of Laws of 1834. Until the consummation of the proceedings had under and in pursuance of chapter 484 of Laws of 1859, the Brooklyn and Jamaica railroad and its lessee, the Long Island Railroad Company, had a right to operate a railroad by steam over and upon lands, the principal part of which is now Atlantic avenue, in the city of Brooklyn. When the act of 1859 was passed, the defendant, "The Long Island Railroad Company," reached the East river by a tunnel under the surface of Atlantic avenue. The act of 1859 (*chap.* 484, *Laws of* 1859) was entitled "An act to provide for the closing of the entrances of the tunnel of the Long Island Railroad Company in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city." The provisions of this act were substantially carried out. The agreement of the commissioners appointed under the act of 1859, providing for the closing of the tunnel and the surrender of the right to use steam upon the avenue, was with the Brooklyn and Jamaica Railroad Company, who, as the lease originally executed by them to the Long Island Railroad had been surrendered, are styled therein "the assignees of the Long Island Railroad Company, within the true meaning and intent of both the said acts," to wit, the said act of 1859, and another relating to the same sub-

ject, passed March 23, 1860. The contract required the tunnel to be closed, and the various things done which the law of 1859 enjoined, and the Brooklyn and Jamaica Railroad Company relinquished "its right to use steam within the corporation limits of the city of Brooklyn," and agreed that "steam power shall not be used or permitted upon its road, or any part thereof, within the limits of the city of Brooklyn," after the happening of an event specified in the agreement. To this contract the Long Island Railroad assented, "so far as it has any right so to do, and so far as it has any interest therein." The compensation which the Brooklyn and Jamaica Railroad Company received under this agreement was \$125,000, which was levied upon a district prescribed by the said act of 1859, and which was supposed to be specially benefited by the abandonment of the use of steam power upon Atlantic avenue. On April 5, 1855, the Brooklyn and Jamaica Railroad Company executed to Samuel Willets, Robert Ray and Alexander Hamilton, Jr., as trustees, a mortgage to secure its bonds to the amount of \$100,000. This mortgage covered all its property, including that leased to the Long Island Railroad Company. On the 21st of March, 1872, a decree of sale (in a suit to foreclose this mortgage) was made, such sale to be "subject to a certain agreement or release made between the Brooklyn and Jamaica Railroad and the Long Island Railroad Company, dated April, 1860" (it being an agreement between those two companies, and not the one between the Brooklyn and Jamaica Railroad Company and the commissioners appointed under the act of 1859), "and subject also to the provisions of the act of 1859," and subject also to the provisions of a certain other act passed April 16, 1860, entitled "An act authorizing the Brook-

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lyn Central and the Brooklyn and Jamaica Railroad Companies to consolidate, and continue their roads so far as such provisions of said acts relate to the closing of the tunnel in Atlantic street, in the city of Brooklyn, and the relinquishment of steam power within the limits of said city." Under this decree of foreclosure the property of the Brooklyn and Jamaica Railroad was sold, and one William Richardson became the purchaser, the property being bought subject to the condition contained in the decree. On the 29th day of April, 1873, in pursuance of the act, entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, a railroad corporation was formed under the name of "The Atlantic Avenue Railroad Company of Brooklyn." To this corporation, on the 28th day of February, 1874, William Richardson, the purchaser at the foreclosure sale, conveyed the property bought thereat, and which in the deed is described as "all and singular the railroad of the Brooklyn and Jamaica Railroad Company, extending from its commencement at the ferry at the foot of Atlantic street, in the city of Brooklyn, in Kings county, to its termination in the village and town of Jamaica, in the county of Queens, including all its appendages and the depot lots in the village of Bedford, and the right to construct branches to Flushing or Flatbush, as secured to the said The Brooklyn and Jamaica Railroad Company by their act of incorporation." On the 26th of March, 1877, the Atlantic Avenue Railroad Company leased to the Long Island Railroad Company, "its successors and assigns, all the railroad of the party of the first part, extending from its eastern terminus in the village of Jamaica, westward to the city line of the city of Brooklyn in Atlantic avenue, and thence

along said avenue to a point in Atlantic avenue in the city of Brooklyn, 250 feet east of the easterly line of Flatbush avenue, said 250 feet to be measured along a line in the centre of Atlantic avenue," and also sundry other property as is in the lease specially provided. By chapter 187 of the Laws of 1876, it was declared "it shall be lawful for the Atlantic Avenue Railroad Company of Brooklyn, and for the Long Island Railroad Company, as lessee from the Atlantic Avenue Railroad Company of Brooklyn, of that part of the railroad of said Atlantic Railroad Company which extends from the junction of Atlantic and Flatbush avenues, in the city of Brooklyn, eastwardly along said Atlantic avenue, to the city line, to run cars over said railroad, upon Atlantic avenue, from the city line of Brooklyn to Flatbush avenue, by steam power, subject to such rules and regulations as to rate of speed and public safety "as from time to time the common council of the city of Brooklyn may prescribe." Under this law the defendants were, when this suit was commenced, adapting and changing the horse railroad track to that of a steam railway, and are now propelling cars thereon by steam. Against this the plaintiffs ask an injunction, because, as they allege, by the acts closing the Atlantic tunnel, and the agreements thereunder, the defendant, the Long Island Railroad Company, has agreed never to run cars propelled by steam over such route, and that the property was purchased at mortgage foreclosure sale charged with such a prohibition; and also because, as is claimed, the act of 1876 is unconstitutional:

Held, first, that the Long Island Railroad Company has not made any agreement or promise obligating itself not to use steam either upon Atlantic avenue or elsewhere.

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Second. As the decree in the foreclosure suit provided that the sale was subject to the provisions of the agreement between the two companies, and as such agreement only obligated the Brooklyn and Jamaica Railroad Company to the Long Island Railroad Company not to use steam cars upon the avenue, which agreement was for its own benefit, and as it had not bound itself to any one in the same direction, it follows that when the Long Island Railroad Company acquired title to the road way there was no prohibition as to them preventing a legislative license for the use of steam power thereon. The Long Island Railroad Company cannot be bound by the provision in the mortgage foreclosure decree, because the contract was to and with it, and not by it.

Third. As to the other exceptions and reservations contained in the decree of foreclosure—relating to the acts under which the tunnel was closed—nothing therein contained prevented these defendants, or either of them, from acquiring a future right to use steam upon the avenue. The surrender of a right existing by its owner is no covenant against a future acquirement thereof, any more than a sale of present interest in any property or business is an agreement against a future repurchase.

Fourth. That no contract whatever existed by force of the act of 1859 preventing the state in the future from conferring the right to use steam on Atlantic avenue, Brooklyn, upon the defendants. Nor can one legislature by a law deprive a succeeding one, in a matter of public policy, from changing or altering the enactment.

Fifth. That no agreement has been made either with the people, the city of Brooklyn or the owners of the property in the district taxed under the act of 1859, which will justify the maintenance of this action.

Sixth. That a railroad corporation cannot, by contract, when no statute authorizes it so to do, bind itself to a particular mode of propelling power, regardless of the interests of the people, which may require it to adopt a different one.

Seventh. The statute (*Laws of 1876, chap. 187*) under which the defendants claim the right to use steam upon the avenue, is not obnoxious to section 1 of article 14 of the Constitution of the United States, declaring, among other things, that no state can "deprive any *person* of life, liberty or *property* without due process of law," nor to section 6 of article 1 of the Constitution of this state, which likewise provides that "no *person* shall * * * be deprived of life, liberty or *property* without due process of law."

Eighth. That when, as against the owners of the land, the right to operate a railroad has been acquired, the mode of such use, whether by steam or otherwise, is a matter within legislative control, and in regulating such use, no right of property is infringed upon, to which the above cited provisions from the federal and state Constitutions are applicable.

Ninth. That the act (*Laws of 1876, chap. 187*) is not unconstitutional under section 18 of article 3 of the Constitution, which prohibits the legislature from passing "a private or local bill * * * granting to any corporation, association or individual the right to lay down railroad tracks;" or "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." (*The People agt. Long Island Railroad Company, ante, 395.*)

3. The act of 1876 confers "no right to lay down railroad tracks." The privilege so to do was one already enjoyed by both defendants as already existing railroad corporations. The act gave legis-

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lative permission to use steam as a motive power on railroad tracks already constructed, the right to relay and repair which was an incident to the original grant. Such a legislative permission to an existing corporation is not covered by the above constitutional provision. (*Id*)

4. Nor do the defendants obtain under the law an "exclusive privilege" or "franchise." The prohibition is to a grant which *in words* is exclusive. It may be true that conferring upon A. authority to do an act, may practically prohibit B. from doing the same thing, because the latter may be unwilling to compete with the former; but so long as B. is left free to act, and nothing has been done which, if valid, would enable A. to enjoin B., because he (A.) has an exclusive right, the provision in the Constitution is not violated.

Tenth. That if there is a defect in the title to any of the land occupied by the defendants, such defect does not justify this action, but each owner of the land wrongfully held must seek his remedy by suit brought in his own name.

RECEIVER.

1. A receiver in supplementary proceedings may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted (*Overruling Branch agt. Branch*, 49 *How.*, 196; and *Cumming, Receiver*, agt. *Edgerton*, 9 *Bosw.*, 685). (*Baker agt. Van Epps*, ante, 79.)
2. The payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not *ipso facto* discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his authority, which may be required to be paid before the prop-

erty held by him can be taken out of his possession. (*Crook agt. Findley*, ante, 375.)

See CORPORATIONS.

Bliven agt. Peru Steel and Iron Company, ante, 280.

REFEREE.

1. Where two causes against the same defendants were referred by consent and the referee had heard and determined the first in favor of the plaintiff, a number of questions involved in the second cause being also involved in the first case; on motion by defendants:

Held, that the order of reference should be vacated and a new referee substituted. (*Conley agt. Petrie et al.*, ante, 299.)

2. In July, 1877, a claim against the estate of a deceased person was, pursuant to the statute, referred to J. L. Angle, Esq., to hear and determine. The trial was commenced on the 4th day of September, 1877, and continued by adjournments until December 22, 1877, when it was suspended without day. On December 20, 1877, the said J. L. Angle was appointed a justice of the supreme court, to fill a vacancy therein, and on December twenty-second he accepted the said office, and entered upon and continued to discharge the duties thereof until the expiration of the term for which he was appointed, viz.: December 31, 1878.

On August 10, 1878, the said J. L. Angle, as referee as aforesaid, made and filed his report in the case. Upon an appeal from an order denying a motion to vacate the report, on the ground that the referee was incompetent to act as such while holding the office of a justice of the supreme court:

Held, that the prohibition contained in section 25 of article 6 of the Constitution was absolute and peremptory, and prevented any

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justice of the supreme court from acting as a referee.

That the facts that the trial of the action had been commenced before he was appointed a justice of the said court, and that he acted without making any charge for his services, did not relieve him from the said prohibition. (*Countryman* agt. *Norton*, 21 *Hun*, 17.)

3. That the provision could not be waived by any stipulation or acts on the part of the defendant. (*Id.*)

4. That as the referee had since ceased to be a justice of the supreme court, his report should be set aside, and either party should be allowed to proceed with the reference on the evidence and proceedings as they stood on the 22d day of December, 1877. (*Id.*)

5. Under general rule No. 30, the testimony taken before a referee must be filed with his report, and until this is done the filing is incomplete, and the time within which exceptions to the report must be filed and served does not begin to run. (*Pope* agt. *Perault*, 22 *Hun*, 468.)

6. If the stenographer deliver his notes to the referee to be examined by him and used as the basis of his report, he cannot limit the effect of such delivery, and it is the duty of the referee to file them with his report, even though the fees of the stenographer remain unpaid. (*Id.*)

7. To sell in action for partition; duty of, as to securities to be taken for the purchase-price; what acts of the beneficiaries amount to a ratification of his act in taking an unauthorized security instead of cash. (*See Wiggins* agt. *Howard*, 22 *Hun*, 126.)

8. When it cannot be ordered without the consent of the parties; the right to order one is not affected

by the fact that one of the parties is a receiver. (*See Durkin* agt. *Sharp*, 22 *Hun*, 132.)

9. When an action by an attorney for professional services involves the examination of a long account; when it may be referred to an attorney to hear and determine. (*See Carr* agt. *Berdell*, 22 *Hun*, 130.)

REFERENCE.

1. Section 1013 of the Code of Civil Procedure, authorizing the court to order a compulsory reference, where the trial will require the examination of a long account, and will not require the decision of difficult questions of law, is applicable as well to such actions as are of equitable as to such as are of legal cognizance.

The only effect of the last clause of the said section is to authorize the court to appoint a referee to decide some of the issues, less than the whole, or to report findings upon one or more specific questions of fact.

In no case can the court order the compulsory reference of an action where the trial will not require the examination of a long account or will require the decision of difficult questions of law. (*Dane* agt. *Liverpool, &c., Ins. Co.*, 21 *Hun*, 259.)

2. Action for a breach of the covenants contained in a lease; when it involves the examination of a long account, so as to authorize a compulsory reference thereof; interposition of a counter-claim in such an action does not prevent its reference (*Code of Civil Procedure*, sec. 974). (*See Brooklyn, &c., R. R. Co.*, 21 *Hun*, 273.)

3. Upon a reference as to surplus moneys in a foreclosure suit, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances as well as

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- liens may be attacked as fraudulent. (*Bergen* agt. *Carman*, 79 N. Y., 146.)
4. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance upon such a reference; he is not bound to bring ejectment, or an action to set aside the conveyance. (*Id.*)
 5. To sustain an exception to the refusal of a referee to find facts as requested, it is incumbent upon the party to show that the material facts so requested to be found were established by uncontroverted evidence, and that if found they would have affected the result. (*Stewart* agt. *Moras*, 79 N. Y., 629.)
 6. No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. (*Id.*)
 7. After plaintiff had been partially examined as a witness on trial before a referee, the hearing was adjourned, and was set down for two successive days. The referee upon the first day informed the attorney for the parties that the case would not be proceeded with that day, but would be the next. He was advised by defendant's attorney that he could not attend the next day; he did not appear, and the case was proceeded with on the second day; several witnesses being examined for plaintiff without any one appearing for defendant. A motion was made on behalf of defendant at special term to strike out the evidence so given, which was denied. A similar motion was thereafter made before the referee upon a subsequent hearing:
Held, that the motion was prop-
 - erly denied. (*Comins* agt. *Hetfield*, 80 N. Y., 261.)
 8. Fees of sheriffs and referees on foreclosure sale in the city of New York, amount of. (*See Schermerhorn* agt. *Prouty*, 80 N. Y., 317.)
 9. When case will be sent back to referee for more particular findings. (*See Bigler* agt. *Pinkney* [Mem.], 80 N. Y., 636.)

REGISTER OF NEW YORK.

1. The register of the city of New York is liable for all errors, inaccuracies or mistakes made in a return, when the usual requisition has been made at his office for a certificate of search. (*Van Schaick* agt. *Sigel*, ante, 122.)
2. And this, although the party in making his requisition at the register's office, designated the clerk whom he desired should make the search (*Affirming S. C.*, 58 How., 211). (*Id.*)
3. It is the duty of the register to make the search correct, and any failure in that respect is a neglect of duty. (*Id.*)
4. Where a plaintiff has been damaged by a wrong-doer, he must see to it that his loss is not swollen by any act of omission, or of commission on his part, but he is not called upon to do an act which will not affect his own damages, though it would be of service to the wrong-doer. (*Id.*)

REMOVAL OF CAUSE.

1. Where an action is brought in a state court for an amount less than \$500, and the defendant in his answer pleads a counter-claim exceeding the sum of \$500, which is replied to by the plaintiffs:
Held, on an application for removal from state to a federal court

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the counter-claim must be considered, and that the matter in dispute exceeds \$500 (*Overruling same case in 49 How., 480*). (*Clark-ton et al. agt. Manson, ante, 45.*)

2. Under the provisions of the act of congress (*chap. 137 of 1875*), providing for the removal of causes into the United States courts, "before or at the term at which said cause could be first tried, and before the trial thereof," it is too late to make such application after a demurrer has been interposed and duly argued and decided. (*Miller agt. Kent, ante, 451.*)

3. In all the states there is, by law or rule, a term, *i. e.*, a term at which a cause may for the first time be called for trial. This is the term at which, within the meaning of the law, the cause could first be tried, and, therefore, is the term at or before which the petition for the removal must be filed. (*Id.*)

4. All the persons constituting "the party" on one side must be citizens of different states from those on the other side. (*Id.*)

5. To warrant a removal under the provisions of the act of 1875, covering suits between citizens of different States, *if any person who is a necessary plaintiff and any person who is a necessary defendant are citizens of the same state, there is no right of removal. All the defendants compose the "party" who may ask for a removal, and they must all be other states' citizens.* (*Id.*)

6. The averments of the petition are not conclusive on the state courts. The court has the power and the right to examine other papers than the mere affidavit of the petitioner, to ascertain whether the statute permitting the removal of the cause has been complied with. (*Id.*)

REPLEVIN.

1. Section 1736 of the Code of Civil Procedure, continuing an action of replevin, notwithstanding the death of either party, in favor of or against his executors or administrators, applies only to actions in which the sole defendant was living on September 1, 1880, and is not retroactive. (*Burnham et al. agt. Brennan, ante, 310.*)

RULES.

1. The rule of the court of chancery (*rule 158*), requiring an infant to join when he is over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction or invalidate a sale under the proceedings. (*Cole agt. Gourlay, 79 N. Y., 527.*)

2. So, also, said court had power to dispense with the provision of said rule, requiring corroborating affidavits; and with that requiring the petition to be by the general guardian of the infant, or to show that he has none. (*Id.*)

3. A motion for judgment upon the return to a writ of *certiorari* in proceedings before the mayor of the city of New York to remove a police commissioner presents a question of law only, and comes within the class of non-enumerated motions as defined by supreme court rule 38. (*People ex rel. Mayor, &c. agt. Nichols, 79 N. Y., 583.*)

4. But if otherwise, it is within the jurisdiction of the court to hear it at any special term, and upon such notice as shall be prescribed. (*Id.*)

5. A notice of less than eight days may be prescribed (*Code of Civil Procedure, sec. 780, S. C. rule 37*) by order to show cause. (*Id.*)

6. The power to shorten notice is

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- not affected by the rule of the supreme court (*rule 44*), providing that a case on a *certiorari* may be brought to a hearing upon the usual notice of argument; the rule is binding only as it is consistent with the Code (*sec. 17*). (*Id.*)
7. *Held*, that the rule of the supreme court (*rule 34 of 1858, 47 of 1871 and 1874, and rule 32 of 1877*), requiring a case to be served within ten days after written notice of the decision, or report was in conflict with the Code, and consequently inoperative. (*French agt. Powers, 80 N. Y., 146.*)
 8. Omission to comply with rule 25 requiring affidavits on *ex parte* application to state whether previous application has been made does not affect jurisdiction, it is a mere irregularity. *See Mojarrieta agt. Saenz, 80 N. Y., 547.*
- ### SHERIFF.
1. Though, as a general rule, a sheriff who under execution has levied upon and sold certain property as belonging to the defendant in the execution, will not be permitted, when called upon to account for the proceeds, to allege that the property in fact did not belong to said defendant. Yet, when upon motion to compel payment of surplus such defendant has put himself on record, under oath, that the property taken belonged to his wife, and that he had no interest therein, his right to recover the alleged surplus is not so clear that the court should enforce it on a summary application. (*Frankel agt. Elias, ante, 74.*)
 2. Such motion does not come under the one year limitation prescribed by section 385 of the Code of Civil Procedure, but under the three year limitation, as prescribed by section 383. (*Id.*)
 3. Under subdivision 4 of section 3307 of the Code of Civil Procedure the sheriff is entitled to three term fees after that Code took effect, although he had previously received three term fees. (*Little et al. agt. Coyle et al., ante, 76.*)
 4. Under a judgment recovered by the plaintiffs against T., and execution issued thereon, the plaintiffs had purchased the property in question, which was household furniture. They also, in the same manner, acquired title to goods in a store which had previous to that time been owned and conducted by T. From the time of the purchase T. had remained in possession of the goods (the household furniture) under an agreement by which he carried on the old business of his in the store for the benefit of the plaintiffs as their agent or clerk, at a salary, with the right to retain the furniture in his own house for the use of himself and family. The defendant, as sheriff of Ulster county, had, at the time this action was commenced, under an execution issued upon a judgment duly recovered in this court against said T., made a levy upon the furniture then in possession of T., and used by him in the dwelling-house which he occupied, but had not removed the same nor in any manner interfered therewith further than to make the levy. No demand of the possession of the property was made of the defendant prior to the commencement of this action:
Held, that although plaintiffs could maintain an action to recover the possession of the property, the action could not be maintained without a demand. The mere levy upon the goods is not sufficient in itself to maintain the action. (*Masten agt. Webb, ante, 302.*)
 5. The agreement under which T. held the property gave him no right to hold the same for any specified or definite period. He

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had no leviabie interest whatever therein. He was but the servant or clerk of the plaintiffs, holding the property for them during their pleasure. The plaintiffs, therefore, were not only the owners, but were entitled to the immediate possession of the property at the time of the levy. (*Id.*)

6. When a person is in possession of and exercising acts of ownership over personal property of another, the owner cannot, until demand or notice to the sheriff, maintain an action against him for levying upon and taking it under process against the person in possession. (*Id.*)

7. An outgoing sheriff cannot be held liable for failure to deliver to his successor, or for the escape of a prisoner held upon execution against the person, who was in custody of such outgoing sheriff, confined within the jail limits, where no certificate of election is shown to have been served by the incoming sheriff upon the outgoing sheriff, because until such service the powers of the outgoing sheriff, as to prisoners in his custody, remain unchanged; and therefore there could be no escape so long as the prisoner was in actual custody, and had not left the jail limits. (*Feerick* agt. *Conner*, ante, 506.)

8. A sheriff who has taken a defendant into custody on an execution against the person, is entitled to his poundage, although the execution be not in fact paid. (*Ryle* agt. *Falk*, ante, 516.)

9. Such defendant is not entitled to his discharge upon plaintiff's consent until either he or the plaintiff shall have paid such poundage. (*Id.*)

10. In an action against a sheriff for the escape of one held by him by virtue of a precept or mandate issued by a surrogate, upon

a decree entered upon a final accounting, rendered by such person after letters of administration issued to him had been revoked, the sheriff cannot avail himself of any error in the decree, or in the process upon which the arrest was made, unless it be such as to render the latter absolutely void. (*Dunford* agt. *Weaver*, 21 *Hun*, 349.)

11. In such an action the plaintiff, if successful, is entitled to recover as damages, under section 158 of the Code of Civil Procedure, the amount named in the warrant of commitment, with interest thereon, if it so provides. (*Id.*)

12. Evidence to show that the person arrested was insolvent is not admissible in such an action in mitigation of damages. (*Id.*)

13. When the sheriff has become liable as bail, by reason of the failure of the original sureties to justify, he may exonerate himself by surrendering the principal to the jail before the expiration of the time to answer, or within such time thereafter as the court may deem just to prescribe. (*Douglass* agt. *Haberstro*, 21 *Hun*, 320.)

14. But to entitle the sheriff to an order allowing him to surrender the principal, after the time to answer has expired, he must show a substantial and sufficient excuse for permitting the defendant in the execution to be at large. (*Id.*)

15. Defendant H., having been arrested upon an order of arrest issued in an action to recover the possession of personal property, was discharged from arrest upon giving to the sheriff an undertaking, in and by which the sureties undertook that H. should "at all times render himself amenable to the process of the court, * * * and for the payment to the plaintiffs of such sum as may, for any cause, be recovered against the

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defendant," instead of an undertaking for the delivery of the property to the plaintiff, if delivery be adjudged, etc., as prescribed by the Code of Procedure (*secs.* 187, 211). In an action upon the undertaking, *held*, that the final clause therein, *i. e.*, as to payment, was to be construed in connection with the provision of said Code (*sec.* 277), directing the form of judgment in such an action; and that, as so construed, it was not an absolute undertaking to pay the value of the property, but only to pay on condition that no delivery can be had; but that the undertaking was void as having been taken *colore officii*, within the meaning of the statute (2 R. S., 286, *sec.* 59), for the reason that it bound the sureties for the amenability of H. to process, an obligation which could not be required from H. as a condition of his relief. (*Cook agt. Freudenthal*, 80 N. Y., 202.)

16. It was claimed that this provision in the undertaking should be rejected as surplusage, for the reason that an execution against the body could not issue on the judgment in the action, and so that no liability could arise under the clause in question:

Held, untenable, as an execution against the body could have been issued (*Code of Procedure*, *sec.* 288) after a return unsatisfied of an execution against the property of H. (*Id.*)

17. Also, *held*, that in the absence of any evidence as to the circumstances under which the undertaking was given, it was to be assumed that the sheriff designedly took the undertaking in the form in which it was given. (*Id.*)
18. Also, *held*, that the undertaking could not be treated as an agreement between the parties to the replevin suit, and so enforceable by plaintiffs; that, although taken by the sheriff for the benefit of the

plaintiffs it was also for his own protection, and in taking it he acted, not as the private agent of the plaintiffs, but as agent of the law. (*Id.*)

19. The doctrine of ratification by the plaintiff in an action, of an unauthorized act of the sheriff, has no application to the case of a security taken by him in the assumed exercise of his official authority and duty, from one under arrest, containing conditions not embraced in the statutes. (*Id.*)
20. When undertaking in form, unauthorized by the statute, taken by sheriff from defendant arrested under order of arrest in action to recover possession of personal property is void. (*See Cook agt. Freudenthal*, 80 N. Y., 202.)
21. Fees of sheriffs and referees on foreclosure sale in city of New York, amount of. *See Schemerhorn agt. Prouty*, 80 N. Y., 317.)

SHERIFF'S SALE.

1. Where a certificate of the sale of real estate by a sheriff has been duly filed with and recorded by the proper county clerk, as required by chapter 60 of 1857, such record or a certified copy thereof is evidence of the facts therein contained in all courts and places, the same as if the original record were produced, even though the original certificate was not acknowledged by the sheriff, and though no copy thereof was filed in the office of the register of the said county, in those counties in which such an office exists.

The plaintiff brought this action to recover a certain piece of land in the city of New York to which he claimed title by virtue of a sale, under an execution issued upon a judgment against the owner thereof, recovered and docketed in Rensselaer county, on December 6, 1864, a transcript

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of which had been duly filed in the office of the clerk of the city and county of New York, on February 4, 1865. The plaintiff having proved the execution and delivery to him of a certificate of sale by the sheriff, offered in evidence a deed, executed by the sheriff, containing the usual recitals. Both the certificate and deed stated that the sheriff had sold all the interest the judgment debtor had in the premises on the 6th day of December, 1864.

The plaintiff then called a witness, who produced a printed notice, subscribed in the name of the sheriff and one of his deputies, of the sale of the premises in the usual form, and testified that he saw it published about a little over six weeks before the sale, in one of the newspapers of the city, though he could not recollect the name of the paper; that he saw a like notice posted in different public places in the city, and that he was present when the sale was made. Upon the defendant's objection and against the plaintiff's exception, both the notice produced by the witness and the deed were excluded by the court:

Held, that this was error. (*Clute* agt *Emmerich*, 21 *Hun.* 122.)

2. That the error made in selling the interest which the judgment debtor had in the land on the day the judgment was docketed, instead of that which he had on the day the transcript was filed in New York could not possibly have mislead or injured the defendant, and should have been disregarded. (*Id.*)
3. That the notice produced by the witness and his testimony were sufficient to have justified the jury in finding that the sheriff had given due notice of the sale as required by law. (*Id.*)
4. *Semble*, that the deed itself was presumptive evidence that the sheriff had performed his duty in giving the notices required by law. (*Id.*)

SHIP OWNERS.

1. Where a barge is towed by a steamboat, the steamboat is the superior mind, and the captain of the barge cannot prevent the pilot of the steamboat from going out. The assent or dissent of such a captain as to proceeding on the voyage is scarcely material. (*Davidson* agt. *Holden et al.*, ante, 327.)

2. If the contractor or freighter is negligent in providing an unseaworthy barge, the shipper may, nevertheless, either sue him or his sub-contractors (the owners of the steamboat), in case of loss by stress of weather, occasioned as well through the negligence of the sub-contractors as through the inherent unsoundness of the barge. (*Id.*)

3. The owners of the steamboat are responsible to the shippers for negligence in going out in stormy weather, and thus occasioning loss of cargo, although there is no privity of contract between them. (*Id.*)

4. The overloading of the barge, or the barge's unseaworthiness being evident to, or known of by, defendant's pilot, are no defense here. (*Id.*)

5. Where the loss is caused by the owners' design or neglect, or occurs with his privity or knowledge, a plaintiff may proceed in the state courts notwithstanding the pendency of proceedings in the United States district court; but he proceeds at the risk of wholly failing in the action if he should fail to bring his case within one of the exceptions. (*Checkley* agt. *Providence and Stonington Steamship Co.*, ante, 510.)

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SLANDER.

See BILL OF PARTICULARS.

Jones agt. *Platt*, ante, 277.

See COMPLAINT.

Havemeyer agt. *Fuller*, ante, 316.

STATUTE OF LIMITATIONS.

1. In proceedings instituted under section 375 of the Code of Procedure, to require one joint debtor, not originally summoned to answer the complaint, to show cause why he should not be bound by the judgment entered against his co-debtor, the fact that an action upon the original contract would then be barred by the statute of limitations constitutes no defense, provided that the statute had not run at the time the action was originally commenced against the defendant upon whom the summons was served. (*Maples* agt. *Mackey*, 22 Hun, 282.)

STAY OF PROCEEDINGS.

1. During the pendency of this action and prior to the recovery of a judgment herein, the defendant procured from the court of common pleas of the city of New York an order directing him to make an assignment of all his property, and discharging him from his debts, under the "Two-Third Act." Thereafter this order was, upon the plaintiff's application, vacated, and the discharge canceled, on the ground that it was fraudulently and irregularly procured. From this last order the defendant appealed to the general term of the common pleas, and procured a stay of all proceedings in the court of common pleas during the pendency of such appeal. Thereafter, the plaintiff having recovered a judgment in this action and instituted proceedings to procure the

appointment of a receiver, the defendant obtained an order staying all proceedings in this action pending the stay granted by the common pleas.

Upon an appeal from that order, held, that the stay of proceedings was in effect an injunction staying proceedings upon a judgment for a sum of money, within sections 613 and 618 of the Code of Civil Procedure, and could only be granted upon the payment of the amount thereof into court or upon security therefor being given as therein provided. (*Eastman* agt. *Starr*, 22 Hun, 465.)

2. That in the absence of any averment of fraud or error, it would be subversive of right and contrary to precedent to stay the enforcement of a valid and regular judgment, without statutory authority, merely because another court might hereafter decide that the defendant was entitled to be discharged from his debts. That the order should be reversed. (*Id.*)

STENOGRAPHER.

1. Although a stenographer is not obliged to part with his notes until his bill has been paid, yet if he do deliver them to the referee to be examined by him and used as the basis of his report, he cannot limit the effect of such delivery, and it is the duty of the referee to file them with his report, even though the fees of the stenographer remain unpaid. (*Pope* agt. *Perault*, 22 Hun, 468.)

STREET OPENINGS.

1. Where an owner of land through which a public street is laid out, in conveying portions of such street makes the street a boundary, the grantees are entitled to the use and enjoyment of the street for that purpose as an easement or

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- servitude to the property granted. (*Matter of Opening Sixty-seventh Street, ante, 264.*)
2. Where land is granted bounded upon a street or highway, there is an implied covenant that there is such a way, and that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it. (*Id.*)
 3. By bounding land conveyed by the side of a street or highway, the land in the highway is excluded by force of the description so used, and does not pass to the grantee. (*Id.*)
 4. Executors acting under a power or trust to sell real estate conferred by will, may lawfully dedicate to public use that portion of the land of the testator within the lines of a proposed street as incidental to the sale of the land in lots or otherwise on each side of the street. (*Id.*)
 5. The power to divide and lay out in lots and streets the land of the testator, is a necessary incident to a power given to executors to sell and dispose of it to the best advantage. (*Id.*)
 6. An owner of a tract of land in the city of New York, by conveying a portion thereof bounded upon a street, dedicates the street not only to the next intersecting avenue, but as far as the same extends through or is laid out over his land. (*Id.*)
 7. Upon the coming in of the report of the commissioners of estimate and assessment, the court will examine the testimony submitted to them as to the value of property to be taken for the street, and if it appears that the amounts awarded are greatly in excess of the real value of the property, the report will not be confirmed. (*Id.*)
 8. Chapter 604, Laws of 1874, entitled "An act to provide for the surveying, laying out and monumenting of certain portions of the city and county of New York, and to provide means therefor," is not unconstitutional for the reason that being a local act the subject of opening streets is not expressed in its title as required by section 16 of article 3 of the Constitution. (*Matter of One Hundred and Thirty-eighth Street, ante, 290.*)
 9. Objections and affidavits in opposition to the report of the commissioners of estimate and assessment, which were not presented to the commissioners within the time or in the manner required by the statute cannot be received upon a motion to confirm their report, a sufficient excuse not being alleged for the omission. (*Id.*)
 10. The report of the commissioners will be regarded with the same or even greater consideration than the verdict of a jury on the question of the value of the property taken or amount assessed, and unless some wrong principle has been adopted in estimating awards granted or assessments imposed, the report will be confirmed. (*Id.*)

SUMMARY PROCEEDINGS.

1. A district court justice has no jurisdiction in summary proceedings to remove a tenant where the premises, which are the subject of controversy, are not within the district in which he was elected. (*The People ex rel. Hambrecht agt. Campbell, ante, 102.*)
2. The statute permitting summary proceedings founded upon an execution sale, affords the vendee of real estate a summary remedy against the judgment debtor in possession. It was not intended to extend the remedy to those in

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possession under the judgment debtor or his legal representatives. (*The People ex rel. Higgins* agt. *McAdam*, ante, 139.)

3. Where the admitted facts take the litigation without the operation of the statute and, consequently, without the jurisdiction of the court, a writ of prohibition is the proper remedy (*Affirming S. C.*, 59 *How.*, 442). (*Id.*)

4. In landlord and tenant proceedings, in the district courts, though the boundaries of the several judicial districts are within the supposed judicial knowledge of the courts, the locality of the streets and avenues and their termini, and the number of houses situated thereon, are not matters of judicial notice; and unless the tenant appears and objects, the proceedings of the justice are not void for want of jurisdiction, though the premises from which such tenant was removed be not within the justice's district. (*People ex rel. Gilmore* agt. *Callahan*, ante, 372.)

5. Summary proceedings under the statute founded on an execution sale may be maintained against the judgment debtor personally, or against any person in possession under him subsequent to the lien of the judgment (*Reversing S. C.*, ante, 139, and 58 *How.*, 442). (*The People ex rel. Higgins* agt. *McAdam*, ante, 444.)

SUMMONS.

1. Where plaintiffs, residents of this state, have a cause of action against defendants, a foreign corporation, arising upon the sale and delivery of personal property made by their brokers, a service upon the president of such corporation while passing through this state was sufficient to commence a suit, although his presence here had no relation whatever to the corporation or to his official

duties, irrespective of the question whether or not the corporation has property within the state, or whether the cause of action arose therein. (*Pope* agt. *Terre Haute Car Manufacturing Company*, ante, 419.)

2. In this action brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, the latter was personally served with the summons and complaint on March 4, 1880, at Nice, in France, where she resided, in pursuance of an order directing the service of the summons by publication. On April sixteenth, and before the time for the defendant to appear and answer had expired, she moved to set aside the order directing the service of the summons by publication, on the ground that, as the action was one in which an attachment could not issue, no judgment could, under section 1217 of the Code of Civil Procedure, be entered against her by default:

Held, that, as the defendant's time to appear and answer had not expired when the motion was made, and as no attempt to enter a judgment by default had been made, the motion was properly denied as premature.

That the order for the service of the summons by publication was properly granted, even though the plaintiff might not thereafter be able to show such a state of facts as would authorize him to enter any judgment against the defendant in case she failed to appear or answer. (*Clark* agt. *Boreel*, 21 *Hun.*, 594.)

3. Service of a summons upon a foreign corporation by serving its president; right of its president to resign to avoid service; what resolution does not so dissolve a corporation as to render it impossible for its officers to thereafter resign. (*See Ervin* agt. *Oregon Steam Nav. Co.*, 22 *Hun.*, 598.)

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SUPERSEDEAS.

1. The defendant in this action, having been arrested and given bail, his sureties neglected to justify, of which fact the sheriff had notice, but owing to some understanding between one of his deputies and the defendant, never lodged defendant in jail, but suffered him to go where he pleased:

Held, that the defendant was not "in actual custody" within the meaning of section 572 of the Code of Civil Procedure, authorizing one in actual custody, by virtue of an order of arrest in an action, to apply for a *supersedeas* if the plaintiff fails to issue an execution against his person within one month after it is within his power so to do. (*Watt agt. Healy*, 22 Hun, 491.)

2. *Quære*, as to whether the old practice authorizing the court to refuse the *supersedeas* where the execution is issued after the service of the motion papers, but before the hearing has been abolished by the Code of Civil Procedure. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. In a proceeding for the examination of a third party, a receiver cannot be appointed without notice to the judgment debtor. (*Morgan agt. Von Kohnstamm*, ante, 161.)
2. Where such judgment debtor is entitled to the income for life of a trust fund under a will, the executors of the trust cannot be restrained from applying the proceeds of the trust. (*Id.*)
3. There was no authority under the former Code for the appointment of a receiver in a proceeding for the examination of a third party, alleged to have property of, or to be indebted to the judgment

debtor. A receiver could be appointed only in a proceeding instituted for the examination of a judgment debtor. (*Id.*)

4. By the provisions of the Code of Civil Procedure, section 2464, a receiver cannot be appointed before an order or warrant, to be examined, is served upon the judgment debtor, without ten days' notice to the judgment debtor, unless he cannot, after due diligence, be found in the state. (*Id.*)

5. The payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not *ipso facto* discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his authority, which may be required to be paid before the property held by him can be taken out of his possession. (*Crook agt. Findley*, ante, 375.)

See PRACTICE.

Tinkev agt. Langdon, ante, 180.

6. Upon an application to vacate an order made herein, on February 13, 1880, directing the defendant to appear and be examined in proceedings supplementary to execution, it was shown that the defendant had already been examined herein, in pursuance of an order made on June 17, 1872, and that such examination had been completed and a receiver appointed. the affidavit upon which the second order was granted made no reference to the previous application:

Held, that the order was properly set aside for that reason. (*Grocers' Bank agt. Bayard*, 21 Hun, 203.)

7. *Quære*, as to whether a second application to examine a judgment debtor may be made *ex parte* or whether notice thereof must be given. (*Id.*)

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8. Upon the appearance of a debtor before a judge, in pursuance of an order for his examination in proceedings supplementary to execution, he admitted that he had in his possession money and property sufficient to satisfy the judgment, and requested a postponement to enable him to apply the same upon the judgment. The judge thereupon made an order reciting the facts, and granting him until a day named to pay the judgment with interest, and the costs, and providing in default thereof that he be adjudged guilty of a willful contempt; it further ordered and directed that in that case he pay to the sheriff a fine of \$384, and be imprisoned until the payment thereof, and that a commitment issue to carry this judgment into effect:

Held, that the defendant could only be convicted of contempt upon the return of an attachment or an order to show cause, and that the court could not thus summarily declare the consequences of a disobedience to its order. (*Tinker* agt. *Crooks*, 22 *Hun*, 579.)

9. To authorize the court to punish a party for contempt in proceedings supplementary to execution, in refusing to pay over money or property in pursuance of its order, it must appear that the specific property or sum of money was, at the time of the service of the order for his examination, in his possession or under his control. (*Id.*)

10. Before her dower has been assigned to her, a widow has no assignable estate or interest in the lands of her deceased husband, nor has she any estate or interest therein which will pass to a receiver (appointed in proceedings supplementary to an execution, issued upon a judgment recovered against her) by a conveyance made by her to him in pursuance of an order of the court by which

the receiver was appointed. (*Payne* agt. *Becker*, 22 *Hun*, 28.)

11. A defendant who has appeared before a referee and been examined, in pursuance of an order made in proceedings supplementary to execution, is entitled to a written notice of an application for the appointment of a receiver; a verbal notice that such an application will be made, given at the close of the examination, is not sufficient. (*Ashley* agt. *Turner*, 22 *Hun*, 226.)

12. Under section 202 of the Code of Procedure, supplementary proceedings cannot be instituted where a transcript of a justice's judgment for less than twenty-five dollars, exclusive of costs, has been filed, and an execution issued thereon has been returned unsatisfied. (*Wolf* agt. *Jordan*, 22 *Hun*, 108.)

SUPREME COURT.

1. The supreme court of this state has no jurisdiction to declare and adjudge the construction to be given to a will, duly admitted to probate in this state, which contains no trusts. (*Wager* agt. *Wager*, 21 *Hun*, 93.)

2. Where a contest has arisen as to the validity of a will, and an appeal has been taken from a decree of the surrogate, admitting the will to probate, but rejecting the codicils thereto, pending which the funds of the estate have, by the consent of the parties, been deposited with him, the supreme court has no power to make an order directing the surrogate to pay over to the executors or their counsel a specified sum of money, to be used and expended by them in the prosecution of the suits relating to the estate. (*Suenarton and ano.* agt. *Hancock and ano.*, 22 *Hun*, 43.)

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SURETIES.

1. The plaintiff in an action, being a non-resident, was required by an order, made on the application of the defendant, to file a bond as security for the costs of the action, and pay ten dollars costs of the motion, within ten days: Within that time the plaintiff filed the bond, but neglected to pay the costs. Thereafter, on the defendant's application, the complaint was dismissed, and a judgment for the costs entered in his favor.

In an action brought by him against the sureties to the said bond, to recover the costs of the action, *held*, that by procuring a dismissal of the complaint, the defendant, in legal effect, refused to accept the bond, and that the same never went into effect or became operative.

That the sureties were not liable thereon, and that the action could not be maintained. (*Remington* agt. *Westermann*, 21 *Hun*, 440.)

2. When an accounting by the guardian is not a prerequisite to an action against his sureties—when no demand is necessary before bringing an action. (*See Girvin* agt. *Hickman*, 21 *Hun*, 316.)

3. On the hearing of an unsuccessful application to dissolve a temporary injunction granted in this action, the defendant's counsel confined his objections to alleged defects in the plaintiff's papers, and did not use affidavits relating to the merits of the action, which he had previously prepared. Upon the trial of the action the complaint was dismissed.

Upon a reference ordered to ascertain the damages sustained by reason of the injunction:

Held, that the sureties to the undertaking were not liable for the costs and expenses of the unsuccessful application to dissolve the injunction. (*Langdon* agt. *Gray*, 22 *Hun*, 511.)

4. Where, upon an appeal to the general term, the appellant, in order to stay proceedings during the pendency thereof, gave a joint undertaking with two sureties, one of whom thereafter became insolvent and died:

Held, that upon the affirmance of the judgment appealed from, the surviving surety was liable to the plaintiff for the amount secured by the undertaking. (*Comins* agt. *Pottle*, 22 *Hun*, 287.)

5. Where, upon an appeal to the court of appeals from an order granting a new trial, the court affirms the order, and renders a judgment absolute in favor of the respondents, in pursuance of section 194 of the Code of Civil Procedure, the sureties upon the undertaking, given by the appellants, are liable for all the costs in the action, and not simply for those incurred by the appeal to the court of appeals. (*Burdett* agt. *Lowe*, 22 *Hun*, 588.)

6. The insolvency of one of the sureties to an undertaking given by the plaintiff, upon procuring an injunction, furnishes no ground for the granting of an order staying generally all proceedings on the part of the plaintiff in the action; the order should direct that the injunction be dissolved, unless the plaintiff file a new undertaking, within a specified period. (*Randall* agt. *Carpenter*, 22 *Hun*, 571.)

SURPRISE.

1. A motion for a new trial on the ground of surprise cannot be made upon the minutes of the justice before whom the action was tried. (*Argall* agt. *Jacobs*, 21 *Hun*, 114.)

TRADES-UNION.

1. The orderly and peaceable assembling or co-operation of persons

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employed in any profession, trade or handicraft for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such right, is now permitted by statute (*Chapter 19, Laws of 1870*). (*Johnston Harvester Company agt. Meinhardt, ante*, 168.)

2. This statute does not, however, permit an association or trades union, so-called, or any body of men in the aggregate, to do any act which each one of such persons in his individual capacity and acting independently had not a right to do before the act was passed. (*Id.*)

3. This act does not shield a person from liability for his action in intimidating or coercing a fellow-laborer so that he shall leave his employer's service. Such conduct is, in its nature, a trespass upon the rights of business of the employer. (*Id.*)

4. If he compels by assault or violence, by threats, by acts of coercion, a fellow-craftsman to leave the employ of another, he commits an offense against the rights of such person which is hardly distinguishable from an act which should itself injure or destroy the product of that man's labor. It is a direct injury to property rights and may be regarded as the sole proximate cause of such injury, for the laborer in such cases has not freedom of action and cannot himself be deemed to take any part in the transaction. (*Id.*)

5. On a motion in behalf of plaintiff for an injunction against the defendants, who are members of a trades union known as the "Iron Moulders' Union," to restrain them from interfering with the business of the plaintiff, or intermeddling with any person in the employ, or anyone with whom the plaintiff is negotiating to enter into such employment, the facts showed a

combination of the defendants and an enticement by them of laborers from the plaintiff's shops, and others who were about to enter the employ of the plaintiff, by means of arguments, persuasion and personal appeals, accompanied by payment of traveling expenses to other localities:

Held, that the laws of this state do not permit an injunction to be granted for such a cause. (*Id.*)

6. There being no sufficient evidence of violence, force or intimidation or coercion on the part of the defendants against the plaintiff's laborers, the position that a confederation of persons to entice away workmen or servants from the plaintiff's employ is an unlawful act, and may be restrained by injunction is untenable. (*Id.*)

7. Although it is the duty of courts and of peace officers to see to it that such controversy shall not result in breaches of the peace, or in such acts as may tend to breaches of the peace, and to hold alike the employer and the employed to the payment of damages for any violation of contract, and to responsibility for any acts which immediately and in a legal sense affect the rights of either, yet the court cannot go beyond preventing breaches of the peace. (*Id.*)

TRIAL.

1. In the absence of any motion or act, on the part of a defendant, upon the trial of an action from which an assent to a decision of the case by the court, and a waiver of the right to go to the jury may be implied, an exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal, that there were questions of fact for the jury; it is not necessary to request the submission of any such fact. (*First Nat. Bank of Springfield agt. Dana*, 79 N. Y., 108.)

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2. Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it. (*Coring* agt. *Altman*, 79 N. Y., 167.)
3. So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. (*Id.*)
4. After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon the subject, and its decision is not reviewable here. (*Id.*)
5. Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of evidence, relating to the same subject-matter. (*Church* agt. *Howard*, 79 N. Y., 415.)
6. In an action for negligence, to justify a nonsuit on the ground of contributory negligence, the undisputed facts must show the omission or commission of some act which the law adjudges negligence; the negligence must appear so clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. (*Stackus* agt. *N. Y. C. and H. R. R. Co.*, 79 N. Y., 464.)
7. *It seems*, that the provision of the Code of Civil Procedure (*sec.* 974), in reference to the mode of trial when defendant interposes a counter-claim, and demands an affirmative judgment, and an issue of fact is joined thereon, applies only when the counter-claim sets up matter for which a separate action might be maintained. (*Cook* agt. *Jenkins*, 79 N. Y., 575.)
8. Where the deposition of a party, taken before trial, is read thereon without objection, he is not thereby precluded from being examined on trial. (*Misland* agt. *Boynnton*, 79 N. Y., 630.)
9. Where evidence which is entirely collateral is drawn out on cross-examination, it cannot be contradicted. (*Id.*)

TRUSTEE.

See EXECUTOR AND ADMINISTRATOR.
Savage agt. *Gould et al.*, *ante*, 234.

TRUST ESTATE.

See WILL.
McCormack agt. *McCormack*,
ante, 196.

UNDERTAKING.

1. It is no objection to an order of arrest granted under subdivision 4 of section 550 of the Code of Civil Procedure, that it prescribes the form of the undertaking to be taken by the sheriff, if such form corresponds with that required by subdivision 1 of section 575 of the same Code. (*Boucicault* agt. *Boucicault*, 21 Hun, 431.)
2. Where, upon an appeal to the general term, the appellant, in order to stay proceedings during the pendency thereof, gave a joint undertaking with two sureties, one of whom thereafter became insolvent and died:
Held, that upon the affirmance of the judgment appealed from, the surviving surety was liable to the plaintiff for the amount se-

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cured by the undertaking. (*Comins* agt. *Pottle*, 22 *Hun*, 287.)

VENUE.

1. Where the place of trial of an action, begun in Rockland county, against the sheriff of that county, and a codefendant, for acts done by the sheriff in his official character, has been changed on application of the codefendant, acquiesced in by the sheriff to New York, and the case has been there tried twice, yet it being now shown that the codefendant has died insolvent; that the cause of action arose in Rockland county; that both parties and a large number of the witnesses reside there, and considering the condition of the calendar in the two counties:

Held, that the action, on application of defendant, should be retransferred to Rockland county, as well for the public interests as for the private interests of the parties. (*Abrahams* agt. *Bensen*, ante, 208.)

WILL.

1. Though where a trust estate created by will provides for accumulations for the benefit of adults as well as minors, it is void under the provisions of the Revised Statutes — yet, where an annuity to the widow, provided for under this trust estate is also charged upon the real estate, that survives the failure of the trust. (*McCormack* agt. *McCormack*, ante, 196.)
2. Such annuity, however, is subject to a proportional deduction in favor of an after-born child, who takes as if the father died intestate. (*Id.*)
3. Where the testator devised real estate to his wife for life, and directed that upon her death it should be sold and the proceeds distributed among his three child-

ren or their legal representatives, the interest vested in each of them as personal estate, and the share of a daughter who died before and that of a son who died after the widow, passed to their next of kin, so that, although it is plain the testator had no intention the children of the half blood should receive any portion of his estate, they must be included in the distribution. (*Freeman* agt. *Smith et al.*, ante, 311.)

4. The testatrix devised two lots and a gore "on the southerly side of Forty-ninth street, near Eighth avenue." Extrinsic evidence upon the trial of the action for construction of the will showed that testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street answering fully, in other respects, the terms of the devise. Extrinsic proof showed further that persons living above One Hundredth street drop the One Hundred and designate the lot by the remaining figures:

Held, that the devisee under the will takes the two lots in question. (*Peters* agt. *Porter et al.*, ante, 422.)

5. It is entirely proper to resort to extrinsic proof to explain a latent ambiguity of this nature as to the subject of the devise, and to make clear the intention of the testatrix. (*Id.*)

WITNESS.

1. *Quere*. Whether, if it be shown that an incompetent witness was sworn and gave testimony before the grand jury, the law does not presume that testimony to defendant's injury was given by such witness and cast the onus of showing the contrary upon the public prosecutor? (*The People* agt. *Briggs*, ante, 17.)
2. Under section 2 of chapter 782 of the Laws of 1876 a wife is not a

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competent witness *against* her husband, and cannot be called against him by the people without his consent. (*Id.*)

3. Right of defendant in an indictment to a list of the witnesses and copy of the testimony before the grand jury discussed by counsel but not determined by the court as the indictment was quashed. (*Id.*)

4. On the hearing of an issue as to whether an excavation in a city street was properly refilled, an expert witness who had heard the evidence as to such refilling, was asked and allowed to answer the following question: "How would you fill such an excavation?"

Held, that while it was proper for the witness to state what would have been a proper manner of refilling the excavation, it was an error to allow him to testify how he would have refilled it. (*Ayres* agt. *Water Commissioners*, 22 *Hun*, 297.)

5. One who has personal knowledge of the facts of a case may give his opinion as an expert, but he cannot give such opinion when he possesses no knowledge of the facts except such as he derives from having heard the testimony of other witnesses. (*Id.*)
6. Where a witness, offered as an expert, has not personal knowl-

edge as to the facts, he can only testify in answer to hypothetical questions which assume the existence of the facts claimed by the party conducting the examination to have been proved. (*Id.*)

7. The fact that one issue existed in the case, which might have been decided in favor of the successful party, does not justify the appellate court in disregarding errors in the admission of testimony bearing upon a different issue, and holding that the evidence so admitted was harmless. (*Id.*)

WRIT OF PROHIBITION.

1. The statute permitting summary proceedings founded upon an execution sale, affords the vendee of real estate a summary remedy against the judgment debtor in possession. It was not intended to extend the remedy to those in possession under the judgment debtor or his legal representatives. (*The People ex rel. Higgins*, agt. *McAdam*, ante, 139.)
2. Where the admitted facts take the litigation without the operation of the statute and, consequently, without the jurisdiction of the court, a writ of prohibition is the proper remedy (*Affirming S. C.*, 59 *How.*, 442). (*Id.*)



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ERRATA.

In the case of *Havemeyer* agt. *Fuller* (*ante*, page 316), in the fifth paragraph of head note, first line, after the word "colloquium," read "*and the want of a colloquium.*" On page 320, seventh line from bottom, after the word "colloquium," read "*and the want of a colloquium.*" On page 321, thirteenth line from bottom, in place of the word "influence" read "*reference to*"; fourth line from bottom, same page, after the word "name" should be a *period*, and the word "*so*" in same line should commence a sentence. On page 322 transpose "*In re Hartley* agt. *Herring*, 3 *Term Rep.*, 133," from second paragraph to commencement of third paragraph.

In the case of *Masten* agt. *Olcott* (*ante*, page 105), it is just to Judge WESTBROOK, to say that his opinion was an oral and not a written and prepared one.



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